TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 275.

[redacted]

[redacted]

SECOND NATIONAL BANK OF CINCINNATI, OHIO.

[redacted]

(26,368)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 378.

W. C. STERRETT, AS RECEIVER OF THE ALABAMA TRUST & SAVINGS COMPANY, PETITIONER,

vs.

SECOND NATIONAL BANK OF CINCINNATI, OHIO.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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a United States Circuit Court of Appeals for the Sixth Circuit.

No. —.

W. C. STERRETT, as Receiver of the Alabama Trust & Savings Company, Appellant,

versus

THE SECOND NATIONAL BANK OF CINCINNATI, Appellee.

Appeal from the District Court of the United States for the Southern District of Ohio, Western Division.

TRANSCRIPT OF RECORD.

Philip & S. C. Roettinger, Cincinnati, Ohio; E. H. Dryer, Birmingham, Alabama, Attorneys for Appellant.
Jelke, Clark & Forchheimer, Charles M. Leslie, Joseph B. Foraker, Joseph Sagmeister, all of Cincinnati, Ohio, Attorneys for Appellees.

1 The District Court of the United States, Southern District of Ohio, Western Division.

TRANSCRIPT OF RECORD.

Bill of Complaint.

(Filed May 11, 1912.)

In the District Court of the United States in and for the Southern District of Ohio, Western Division.

In Equity. No. 2126.

W. C. STERRETT, as Receiver of Alabama Trust & Savings Company, an Insolvent Banking Corporation, Complainant,

vs.

THE SECOND NATIONAL BANK OF CINCINNATI, Defendant.

W. C. Sterrett, who is a citizen of the State of Alabama, over twenty-one years of age, residing at and whose place of abode is at Birmingham, Jefferson County, in the Southern Division of the Northern District of the State of Alabama, as and who is Receiver of Alabama Trust & Savings Company, as hereinafter stated, brings this his bill of complaint pursuant to and in accordance with the order and decree to him directed by the Chancery Court of Jefferson

County, Alabama, a copy of which order is hereby attached marked Exhibit No. 1 and made part hereof, and the authority in him so vested, against the Second National Bank of Cincinnati, a national banking association, organized and existing under the laws of the United States relating to such national banking associations, a citizen of, residing, having its place of abode, and doing business at Cincinnati, in the County of Hamilton, and an inhabitant of the Southern District of the State of Ohio, a citizen of and residing in the Southern District of the State of Ohio. And therefore your orator complains and says:

1. That said Alabama Trust & Savings Company, some 2 years prior to the year 1908, was organized under the laws of the State of Alabama into a banking corporation, with an authorized and paid up capital stock of $100,000, divided into 1,000 shares of the par value of $100.00 each, and as such, from the time of its organization, did a general banking business, with its principal place of business and its residence at Birmingham, in Jefferson County, Alabama, until it closed its doors and discontinued business, on or about the 25th day of September, 1909.

2. That, to-wit, in the year 1908, Ben T. Head, desiring to purchase said 1,000 shares of the capital stock of said Alabama Trust & Savings Company (for brevity, hereinafter called the Savings Company) from the then owners thereof, to-wit, E. N. Cullom and others, for the price of, to-wit, $100,000, applied to said Second National Bank of Cincinnati (for brevity, hereinafter called the Cincinnati Bank) for a loan of that sum for that purpose, which was made, and for which said Head gave to said Cincinnati Bank his note or notes for, to-wit, $100,000, secured as collateral by said 1,000 shares of stock so purchased with the proceeds of said loan. Afterwards, and prior to, to-wit, January 1, 1909, Gus T. Brannon and Ector H. Smith bought said Head's stock in said Savings Bank for, to-wit: $100,000; and, by agreement with him and said Cincinnati Bank, gave their note or notes for that sum in lieu of the said note or notes of said Head, and secured the same by a pledge of the same 1,000 shares, the net result of which was that said Cincinnati Bank accepted the obligation of said Brannon and Smith in lieu of that of said Head, and retained the same 1,000 shares of stock as collateral security therefor; that shortly thereafter, said Brannon and Smith paid on said $100,000 indebtedness, to-wit, $16,000, and said Cincinnati Bank released and surrendered to them 160 of said shares, retaining 840 to secure the balance of, to-wit, $84,000. Afterwards and before, to-wit, July, 1909, said Ector H. Smith and Gus T. Brannon sold at, to-wit, par 540 of said 840 shares as follows, to-wit: To W. K. Smith, 50, to Enos R. Stewart, 200, to J. R. Lewis, 50, to Tom Stobert 100, and to Interstate Securities Company, 140; and said purchasers, by agreement with said Cincinnati Bank, in lieu of said note or notes of said Gus T. Brannon and Ector H. Smith for said balance of, to-wit, $84,000, gave their separate several notes, each respectively secured by a separate pledge, as collateral security therefor, of the portion of the maker of said 840 shares so acquired, divided and reissued to each, respectively, as follows, to-wit:

3

Name of maker of note.	Amount of note.	Number of shares.	Par value.
Gus T. Brannon	$15,000	150	$15,000
Ector H. Smith	15,000	150	15,000
W. K. Smith	5,000	50	5,000
Enos R. Stewart	20,000	200	20,000
J. R. Lewis	5,000	50	5,000
Tom Stobert	10,000	100	10,000
Interstate Securities Co...	14,000	140	14,000
	$84,000	840	$84,000

That when said Head obtained said original loan, the said Cincinnati Bank became the Cincinnati correspondent of said Savings Bank, and so continued through said changes hereinabove set forth; that shortly after said 160 shares were so released and surrendered to said Gus T. Brannon and Ector H. Smith, they were all or a great part thereof by them sold and transferred to divers and sundry persons who had no notice of any of the wrongs and injuries committed by said Cincinnati Bank herein complained of, and as against all of said wrongs and injuries, they were and are bona fide purchasers for adequate value without notice, and their claims as such stockholders remain still outstanding and are wholly unsatisfied; that when said W. K. Smith, Enos R. Stewart, J. R. Lewis and Tom Stobert became stockholders of said Savings Company, as aforesaid, its official organization was changed so as to be as follows, to-wit: Gus T. Brannon, President; Ector H. Smith, Vice-President; J. R. Lewis, Secretary and Treasurer; Tom Stobert, Cashier; and Gus T. Brannon, Ector H. Smith, W. K. Smith, Enos R. Stewart, J. R. Lewis and Tom Stobert, directors, of which said Cincinnati Bank became informed and well knew.

3. That afterwards, to-wit, in June, 1909, in the conduct of business in due course, said Savings Bank had to its deposit with said Cincinnati Bank a credit checking balance of a large sum, to-wit, $17,000, but complainant does not know and has been unable to learn the accurate amount thereof, and was indebted to it in the sum of, to-wit, $28,000, which indebtedness was secured by collateral, consisting of customers' notes and of stocks owned by said Savings Bank, aggregating at face value about $90,000, and worth, to-wit, $80,000, a more particular description of which is unknown to your orator, which, therefore, he can not give; but which is well known to, and

4 can be disclosed by, said Cincinnati Bank, and which in equity and good conscience it should be compelled to discover and to disclose; that said Gus T. Brannon was at that time President of said Savings Company, and its notes were, in the ordinary transaction of its business, executed by it through him acting in that official capacity. Such being the relative situation of said two banks and of said officers of said Savings Bank in their individual relations, with and to said Cincinnati Bank, the latter bank, by and through E. E. Galbreath, who was then its officer and agent, conceived the plan and formed the design of inducing and procuring said officers of said Savings Bank, who had the control and manage-

ment of its business and affairs, to abuse the trust and confidence so exercised by them to the mutual advantage of themselves and of said Cincinnati Bank, and to the injury of the other stockholders of said Savings Bank and of its then existing and subsequent creditors, which it successfully accomplished in manner following, to-wit: It sent its then Vice-President, later its President, said E. E. Galbreath, to Birmingham, Alabama, who persuaded and induced said officers of said Savings Bank to give to said Cincinnati Bank, in lieu of their said respective notes and that of said Interstate Securities Company to it, aggregating as aforesaid, to-wit, $84,000, notes in the same several amounts, purporting to be the notes and obligations of said Savings Company as maker, which notes, respectively, were endorsed by them respectively, as follows, to-wit:

Amount of note.	Endorsed by:
$15,000	Gus T. Brannon
15,000	Ector H. Smith
5,000	W. K. Smith
20,000	Enos R. Stewart
5,000	J. R. Lewis
10,000	Tom Stobert
14,000	Interstate Securities Co.
$84,000	

And each endorser allowed to remain as pledged as collateral security therefor the same respective shares of stock which he had so previously pledged to secure his debt; that said Savings Bank did not authorize the execution of said notes nor did it have charter power to do so had it attempted to so bind itself in such manner as maker of notes purely for the accommodation of its officers and stockholders. The object and purpose of Cincinnati Bank in persuading and inducing said new notes to be so signed and delivered to it, was thereby, through the breach of duty and malfeasance of said officers to obtain apparently valid notes of said Savings Company, to serve as an excuse for its subsequent misapplication of funds and securities in its possession belonging to said Savings Company and held by it in trust, as hereinafter more fully set forth.

4. That, having so obtained said notes aggregating $84,000, purporting to be executed by said Savings Company, as maker, and endorsed as aforesaid, said Cincinnati Bank fraudulently applied said deposit balance owing by it to said Savings Company upon the said three notes, in the respective sums of $15,000, $5,000 and $14,000 endorsed, as aforesaid, by said Gus T. Brannon, W. K. Smith and Interstate Securities Company, respectively; that as soon as said Savings Bank became aware of such misapplication and diversion of its said deposit credit, it objected thereto, and drew checks against the same, payment of which was, by said Cincinnati Bank refused; and said Cincinnati Bank still keeps and withholds said deposit balance or money as if it was and should have been applied on said three notes last hereinabove described, but which, in equity and good conscience, is still the property of the estate of said Savings Company, and is held by said Cincinnati Bank in trust for your orator as its receiver; that

from said collateral notes and bonds pledged as aforesaid by said Savings Company to said Cincinnati Bank, and so held in trust by it to secure and pay said note for, to-wit, $28,000, said Cincinnati Bank has collected large sums of money, the amounts, from whom and when orator does not know and can not ascertain, but which is well known to said Cincinnati Bank, and which in equity and good conscience, it should be compelled to disclose, discover and account for to this complainant as such receiver of said Savings Company; that orator is informed and believes, and upon such information and belief alleges the fact to be, that said Cincinnati Bank has so collected and received in its said fiduciary capacity sums aggregating, to-wit, more than $59,000, or more than, to-wit, $31,000 above what was sufficient to pay said note for $28,000; or, if said deposit balance or credit were applied on said note for $28,000, then, to-wit, more than $48,200 above what was sufficient to pay said $28,000 and all valid indebtedness which was or is owing to said Cincinnati Bank by said Savings Company; that orator does not know what disposition, if any, said Cincinnati Bank made of such of said notes and bonds of said Savings Company it so received and held in pledge and
6 trust as collaterals to secure said note for $28,000, but, in equity and good conscience, it should be decreed to discover and disclose, particularly and minutely, of what said securities consisted, what it collected thereon, when and from whom, and to fully account to orator for all such moneys, and to deliver to him all such as have not been collected by it, and if it has disposed of any part thereof, to account to and pay to orator the full actual value thereof, irrespective of what price it may have received therefor.

5. By reason of said schemes, devices, plans, breaches of trust and wrongs so induced, brought about and perpetrated by said Cincinnati Bank and said E. E. Galbreath, assets of said Savings Company nearly or quite equal in amount and value to its capital stock were by said Cincinnati Bank withdrawn from it, whereby it was so weakened financially as that, after attempting to do business for a while, it did, on, to-wit, the 25th day of September, 1909, close its doors and discontinued to do business, owing a large amount of debts, which are still unpaid, including debts which existed prior to, to-wit, June, 1909, among which is a debt of said Savings Company to Tuskegee Land & Security Company of, to-wit, $5,000 which arose, to-wit, February 10, 1909, evidenced by a time certificate of deposit given by said Savings Company to said Tuskegee Land & Security Company for $5,000 on, to-wit, February 10, 1909, and payable with four per cent. per annum interest thereon from that date, on, to-wit, January 1, 1911.

6. That since, to-wit, October 3, 1903, there has been and still is of force in Alabama a statutory law of that State known as Section 3509 of the Code of Alabama of 1907, which reads as follows:

"3509. Marshalling Assets of Insolvent Corporations.—The assets of insolvent corporations constitute a trust fund for the payment of creditors of such corporations, which may be marshalled and administered in courts of equity in this state."

Pursuant to said statute and the laws of Alabama, on, to-wit, July 21, 1910, Kate Rowland and Frank Matson, as creditors of said Savings Company, filed a bill in the Chancery Court in and for the Fifth

District of the Northwestern Chancery Division of the State of Alabama, comprising said County of Jefferson, the same being a court of record and of general equity jurisdiction of and in said State of Alabama, a copy of which is hereto attached, marked Exhibit 1 and made a part hereof. The parties respondent thereto were personally served with process and brought into said court, and
7 said suit was so regularly prosecuted as that on, to-wit, the 27th day of April, 1911, a general administration decree was therein rendered by said court, a copy of which is hereto attached, marked Exhibit 2 and made a part hereof; and in accordance with said decree, complainant immediately qualified as and continues to be such receiver, and the administration of the estate of said Savings Company is still in progress in and under said Chancery Court.

Prayer.

To the end, therefore, that your orator may have that relief which he can obtain in a court of equity, and that the said defendants may answer the premises, but not upon oath or affirmation, an answer under oath being hereby expressly waived by your orator, he now prays the court:

I.

To grant to your orator a writ of subpœna, to be directed to said Second National Bank of Cincinnati, a national banking association, thereby commanding it at a certain time, and under a certain penalty therein to be limited, to appear before this honorable court, and then and there full, true, direct and perfect answer make to all and singular the premises, and to stand, perform and abide by such order, direction and decree as may be made against them in the premises, as shall seem meet and agreeable in the premises.

II.

That it be required to set forth, specify and produce all notes and other documents in its possession or under its control, evidencing or purporting to evidence any debt or obligation of said Alabama Trust & Savings Company, whether valid or invalid, paid or unpaid, and particularly all notes and other documents purporting to have been made by, or to constitute an obligation of said Savings Company; that said notes or obligations purporting to have been made by it as maker described in numbered paragraph 3, supra, and all renewals thereof, and all substitutes therefor be decreed to be, as to said Savings Company and your orator, invalid and of no effect, and be decreed to be cancelled and surrendered.

III.

That it be compelled and required to account to your orator for all moneys, choses in action, notes, claims, bonds, evidences of debt and other things of value which, as collateral security or otherwise,
8 said Cincinnati Bank at any time received from said Savings Company or from any and all agents and officers thereof, with

interest; and to discover and disclose the same, describing them accurately and minutely; and to discover and disclose how and for what and when received, and what it has collected thereon and from whom, and how and when and in what sums, respectively, and to surrender up any it may have, and, in such recounting, to be charged with the full value of all it may have disposed of, with interest, and that, in said accounting, it be charged with said sums of money, debts, liabilities and demands owing by it to said Savings Company or to orator, with interest and that a decree be rendered in favor of your orator for such balance as, upon discovery and accounting, should be decreed to be paid by said Second National Bank of Cincinnati, to your orator.

IV.

That the defendant may set forth an account of all and of every sum and sums of money and other thing of value received by it, or by any person or persons by its order, or for use or benefit for or in respect of its dealings with Said Alabama Trust & Savings Company, or with any of its servants, agents, officers or employees, directly or indirectly, in which it had or has any interest or concern, and when and from whom and from what, in particular, all and every such sums and things of value, respectively, and for what, were received; and how the same, respectively, have been applied or disposed of; and that the defendant may be decreed to pay to the complainant, as such receiver, what shall be found due from the defendant to the complainant as such receiver, and to deliver up to the complainant all documents in the defendants' possession or under their control, belonging to said Savings Company, or of which complainant should and ought to have possession; that the defendant pay the costs of this suit.

V.

And that your orator may have such other and further relief, preliminary and final, as to the court may seem meet and proper, and which, in equity and good conscience, should be awarded him, and for costs.

GEORGE HUDDLESTON AND
PHILIP & S. C. ROETTINGER,
Solicitors for Complainant.

9 EXHIBIT No. 1.

In the Chancery Court of Jefferson County.

MRS. KATE ROWLAND et al.

vs.

ALABAMA TRUST & SAVINGS CO.

Above cause coming on to be heard upon the petition of W. C. Sterrett, as Receiver, filed herein on Feb. 1, 1912, and upon the

Register's report thereon, and said matter being heard and understood by the court;

It is ordered and decreed that W. C. Sterrett, as Receiver herein of defendant, Alabama Trust & Savings Co., be, and he is hereby, authorized, at his discretion, to prosecute such suit or suits as may be necessary, and to take such steps and proceedings as he may be advised, to recover of Second National Bank of Cincinnati, its officers and agents, any and all such sums for which he may be advised they, or either of them, are liable to said Alabama Trust & Savings Co. or to said W. C. Sterrett, as such Receiver; and to recover any property in the possession or under the control of said parties, or either of them, which may belong to said Alabama Trust & Savings Co. or to which he may be entitled as such Receiver; and to assert against the said Second National Bank of Cincinnati, its officers and agents, or either of them, any legal or equitable claim which he may assert as such Receiver.

This 8th day of March, 1912.

ALFRED H. BENNER,
Chancellor.

EXHIBIT No. 2.

In the Chancery Court of Jefferson County, Alabama.

MRS. KATE ROWLAND and FRANK MATSON, Complainants,

vs.

ALABAMA TRUST & SAVINGS CO., Defendant.

To Honorable Alfred H. Benners, Chancellor:

Your orators, Mrs. Kate Rowland and Frank Matson, exhibit this their bill against Alabama Trust & Savings Co., on behalf of themselves and all other creditors of Alabama Trust & Savings Co., and state the following facts as a basis for the relief hereinafter prayed:

(1) Complainants are each over the age of twenty-one years, and reside in Talladega County, Alabama. Defendant is a banking corporation organized under the General Banking Laws of the State of Alabama, and formerly had its principal place of business in Jefferson County, Alabama.

(2) Defendant is justly indebted to Mrs. Kate Rowland in the sum of Two Hundred and Forty-Three & 70/100 ($243.70) Dollars, with interest thereon, due for money deposited with it by her on July 3, 1909, which debt is evidenced by a certificate of deposit, a copy of which is hereto annexed and made a part hereof as Exhibit A; and Defendant is indebted to Complainant Frank Matson in the sum of Thirty & 00/100 ($30.00) Dollars, due for money deposited by him with it on July 16, 1909, as evidenced by a certificate of deposit, a copy of which is hereto annexed and made a part hereof as Exhibit B.

(3) That Defendant is insolvent and has suspended business; that Defendant is indebted to various and sundry persons other than Complainants in various large sums; that Defendant's assets consti-

tute a trust fund for the payment of Complainants' and Defendant's other creditors, which should be marshalled and administered in this Court.

(4) Complainants file this bill on behalf of themselves and all other creditors of Defendant, and invite such other creditors to make themselves parties thereto and to participate in the distribution of Defendant's assets and to file and propound their claims herein.

Premises considered, Complainants make Alabama Trust & Savings Co. party defendant hereto, and pray that process issue to it and that it be required to plead, answer or demur hereto as provided by law.

Complainants pray that pending the hearing hereof a receiver be appointed for the assets of said Alabama Trust & Savings Co., with such powers and authority as the Court may direct, and that on a final hearing hereof such a receiver be appointed, and that the assets of Defendant may be decreed to constitute a trust fund for the payment of Defendant's creditors, and that same may be marshalled and administered herein; and Complainant- pray for all such further, other and different relief as they may be entitled to hereunder, and for general relief.

GEORGE HUDDLESTON,
Solicitor for Complainants.

NOTE.—Defendant is required to answer all of the allegations of this bill, as contained in Paragraphs 1 to 4 thereof, both inclusive, but not under oath, answer under oath being hereby expressly waived.

GEORGE HUDDLESTON,
Solicitor for Complainants.

11 EXHIBIT A.

Certificate of Deposit.

CHILDERSBURG, ALA., 7/3, 1909. No. —.

Mrs. Kate Rowland has deposited in

Alabama Trust & Savings Co.

$243.70
Two Hundred Forty-Three & 70/100 Dollars
payable to Mrs. Kate Rowland or order on return of this Certificate properly endorsed twelve months after date with interest at 5% per cent. per annum.

No interest after maturity. Not subject to check.

F. C. CULL,
Cashier.

EXHIBIT B.

Certificate of Deposit.

CHILDERSBURG, ALA., July 16, 1909. No. 5.

Mr. Frank Matson has deposited in

Alabama Trust & Savings Co.

Thirty & No/100 $30.00 Dollars
payable to Frank Matson or order on return of this Certificate properly endorsed 12 months after date with interest at 5% per cent. per annum.

No interest after maturity. Not subject to check.

F. C. CULL,
Cashier.

Amendment to Bill.

In the Jefferson Chancery Court.

MRS. KATE ROWLAND et al.

vs.

ALABAMA TRUST & SAVINGS CO.

Complainants, by leave of Court, amend their Bill by adding at the end of Paragraph 3 thereof the following:

"That Defendant has assets consisting of claims and choses in action due it and other personal property, a more particular description of which assets is unknown to Complainants, but the same are of large value, but are not equal in value to the amount of Defendant's liabilities."

GEORGE HUDDLESTON,
Solicitor for Complainants.

EXHIBIT No. 3.

In the Jefferson Chancery Court.

MRS. KATE ROWLAND et al.

vs.

ALABAMA TRUST & SAVINGS CO.

12 Above cause coming on to be heard, was submitted for final decree upon the pleadings and proof as noted by the Register, and said cause being heard and understood by the Court, and the Court being of opinion that the Complainants are entitled to the relief prayed for:

It is ordered and decreed that Complainants are entitled to, and hall have, the relief for which they pray; that Defendant, Alabama 'rust & Savings Co., is indebted to Complainant Mrs. Kate Rowland, s alleged in the Bill, in the sum of $260.01, and to Complainant 'rank Matson in the sum of $32.00; that Defendant is insolvent; hat its assets constitute a trust fund for the payment of its creditors, nd should be marshalled and administered in this Court; that Defendant is a corporation organized under the General Laws of Alaama; that defendant corporation, upon final settlement, should be lissolved, and that a receiver should now be appointed to administer ts estate; that said Defendant has suspended business, and is not bout to resume the same, and can not resume the same with safety o the public; that W. C. Sterrett be, and he is hereby, appointed reeiver of Defendant, and empowered and directed to demand and ake into his possession all of Defendant's assets and property to vhich it is entitled and to recover the same, to be reduced to money nd administered under the further order of the Court, and, to that nd, that the said receiver may employ counsel and may bring such ction at law or in equity as he may be advised, and incur such expense as may be necessary as an incident thereto. He is directed to ile an inventory of the assets of Defendant within sixty days after the nrollment of this decree, and may apply for such further orders herein as may be necessary.

Before entering upon the discharge of his duties, the said receiver s required to give bond in the sum of $25,000, payable to the Regiser, and with surety to be approved by the Register, conditioned to faithfully discharge his duties as such receiver.

It is further ordered that this cause be reserved for further order, marshalling and administering the assets of Defendant and allowing he claims of creditors herein.

This April 27, 1911.

ALFRED H. BENNERS,
Chancellor.

13 *Answer.*

(Filed July 29, 1912.)

The answer of the Second National Bank, defendant, to bill of complaint of W. C. Sterrett, as Receiver of the Alabama Trust & Savings Company, complainant.

This defendant now and at all times hereafter saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill of complaint contained for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering, says:

It admits that W. C. Sterrett is a citizen of the State of Alabama over twenty-one years of age, residing at Birmingham, Jefferson County, Alabama, and that he brings this bill of complaint as receiver of the Alabama Trust & Savings Company, and that the Second National Bank of Cincinnati is a National Banking association

organized and existing under the laws of the United States with its principal place of business at Cincinnati, Ohio.

This defendant further admits that said Alabama Trust & Savings Company was in the year, 1908, a Banking corporation organized under the laws of the State of Alabama with its principal place of business at Birmingham, Alabama, and continued to do Banking business until on or about the 25th day of September, 1909. This defendant avers that it is not advised as to the amount of the capital stock or number of shares of said Alabama Trust & Savings Company.

This defendant admits that on or about the second day of October, 1908, it loaned to Ben T. Head, the sum of One Hundred Thousand ($100,000.00) Dollars upon his promissory note secured by One Thousand (1,000) shares of stock of said Alabama Trust Company, but has no knowledge as to how said Head became the owner of said stock.

This defendant further says that afterwards and prior to, to-wit, January 5, 1909, it loaned to Gus T. Brannon and Ector H. Smith the sum of One Hundred Thousand ($100,000.00) Dollars upon their promissory note; and the proceeds of which note by the direction of said Gus T. Brannon and Ector H. Smith being applied to the payment of said note executed by Ben T. Head. That said note signed by Gus T. Brannon and Ector H. Smith was secured by One Thousand (1,000) shares of the capital stock of said Alabama Trust & Savings Company.

14 This defendant admits that said Brannon and Smith thereafter made partial payments upon said note aggregating Sixteen Thousand ($16,000.00) Dollars.

This defendant denies that thereafter and before, to-wit, July, 1909, it accepted the separate notes of W. K. Smith, Enos R. Stewart, J. R. Lewis, Tom Stobert and The Interstate Securities Company in lieu of the note of said Brannon and Smith in the manner set forth in plaintiff's bill of complaint. That this defendant avers that it discounted for said Alabama Trust & Savings Company the following notes, to-wit:

One note executed by Gus T. Brannon for.....	$15,000.00
" " of Ector H. Smith for.....	$15,000.00
" " executed by W. K. Smith for.....	10,000.00
" " " by Enos R. Stewart for.....	15,000.00
" " " by James R. Louis for.....	5,000.00
" " " by Tom Stobert for.....	10,000.00
" " " by Interstate Securities Co. for.....	14,000.00

That said notes were payable to the Alabama Trust & Savings Company and discounted for it at its request. That said several notes provided that protest and notice of nonpayment were waived by the endorsers thereon. That by direction of said Alabama Savings Bank & Trust Company the proceeds of said several notes were applied to the payment of said note executed by said Gus T. Brannon and Ector H. Smith.

This defendant avers that it has no knowledge as to the sale of One Hundred and Sixty (160) shares of the capital stock of the

abama Trust & Savings Company as set forth in plaintiff's bill of mplaint.

This defendant admits that in June, 1909, said Alabama Trust & vings Company had to its deposit with this defendant a credit bal- ce of Seventeen Thousand Six Hundred and Fifty-five and 33/100 17,655.33) Dollars and that said Trust Company was indebted to is defendant in the sum of Twenty-eight Thousand ($28,000.00) ollars in addition to the aforesaid notes, which indebtedness was ured by collateral consisting of promissory notes and various ocks. That defendant has no knowledge of the value of said col- teral, as a large part of same was returned to the City Bank & rust Company, successor to the Alabama Trust & Savings Com- ny.

This defendant denies that it in any way induced or procured the officers of the Alabama Trust & Savings Company to abuse their trust and confidence as exercised by them to the advantage of this defendant and to the injury of the stockholders said Trust Company and its creditors, and denies that it persuaded induced the officers of said Trust Company to give to said Cincin- ati Bank notes of said Trust Company in the manner set out in laintiff's bill of complaint, but plaintiff avers that prior to May 1, 909, this defendant had requested payment of said several notes scounted for and endorsed by the Alabama Trust & Savings Com- ny. That upon the request of said Trust Company it accepted new otes of said Company in the same amount as said original notes, ch of which notes was endorsed by the several makers of the said iginal notes. That thereafter after demanding payment of said otes, this defendant did on or about June 11, 1909, apply the sum Seventy-two Hundred ($7,200.00) Dollars upon the note of the labama Trust & Savings Company dated May 1, 1909, for Ten housand ($10,000.00) Dollars and endorsed by W. K. Smith, and e sum of Ten Thousand Four Hundred and Fifty-five and 33/100 $10,455.33) Dollars upon the note of said Alabama Trust & Savings ompany dated May 1, 1909, which note was endorsed by Gus T. rannon.

This defendant denies that it holds said sum in trust for said labama Trust & Savings Company or for this Receiver, and denies at it has collected from the collateral belonging to said Alabama rust & Savings Company any sums whatever, except what was fficient to pay the note of said Trust Company for Twenty-eight housand ($28,000.00) Dollars.

This defendant denies that it was instrumental in any manner by y scheme, device, plan or breach of trust through any of its officers agents, or was in any way instrumental in withdrawing from said rust Company any of its assets whereby it became financially em- arrassed and was compelled to discontinue its business owing a large mount of debts which existed prior to June, 1909, in the manner t forth in plaintiff's bill of complaint.

This defendant avers that on or about, to-wit: the 27th day of eptember, 1909, said Alabama Trust & Savings Company under a rtain contract with the City Bank & Trust Company, a corpora- on organized under the laws of the State of Alabama, sold and

transferred its entire assets to said the City Bank & Trust Company for the sum of Ten thousand ($10,000.00) Dollars, and the further consideration that the said City Bank & Trust Company
16 should assume and pay all the obligations of said Alabama Trust & Savings Company. That all of the stockholders of said Alabama Trust & Savings Company had due notice of said agreement, and made no objection thereto. That said City Bank & Trust Company entered into possession of all of the assets of said Alabama Trust & Savings Company under said contract and agreement, and of which facts all of the creditors of the Alabama Trust & Savings Bank had full knowledge, and that thereafter said The City Bank & Trust Company paid to the creditors of said Alabama Trust & Savings Company an amount in excess of the value of the assets received by it from said Alabama Trust & Savings Company.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith it is charged, without this, that there is any other matter, cause or thing in the said plaintiff's bill of complaint to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed and avoided or denied is true to the knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain and prove as this Honorable Court shall direct and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

PECK, SHAFFER & PECK,
Solicitors for Defendant.

FERDINAND JELKE, JR.,
Of Counsel for Defendant.

(Duly verified.)

Replication.

(Filed August 6, 1912.)

And now comes W. C. Sterrett, as Receiver of the Alabama Trust & Savings Company, an insolvent banking corporation as
17 complainant in the above cause and replying to the answer herein filed says that, saving and reserving all manner of exceptions to the insufficiency of the answer, for replication thereto doth say that his bill is true and sufficient as averred, and that he is ready to prove it and that the answer of the defendant is untrue and insufficient.

Wherefore he prays relief as set forth in his original bill.

PHILIP & S. C. ROETTINGER,
EDMUND H. DRYER, AND
GEO. HUDDLESTON,
Solicitors.

Memorandum.

(Filed May 28, 1914.)

SATER, *District Judge:*

A request was made for additional argument before final decision of this case. The litigation ought to terminate with a single trial. The issues as made up do not reach the whole case. The plaintiff seeks to recover on the ground of fraud and makes certain charges of fraudulent conduct against the defendant. He knew that the Alabama Trust & Savings Company conveyed all its property in September, 1909, to the City Bank & Trust Company. A portion of the defense is based on that fact. The plaintiff to make its case endeavors to show that that conveyance was fraudulent, but has tendered no such issue. Fraud is a fact to be alleged and proved. It does not seem reasonable that the defendant, if liable at all, can be liable for the same matter both to the plaintiff and also to the receiver of the City or Guaranty Bank & Trust Company. It is not a part of the record, but it was sufficiently shown in argument to be convincing, that the Receiver of the Guaranty Company presented against
18 the defendant just such a claim as the plaintiff presents, and, it would seem, arising out of the same transaction. A settlement was made. The plaintiff had notice of the controversy between the defendant and the Guaranty Company and its counsel was present when the order of settlement was made. This gives rise to the questions: Did such privity exist between the two Alabama banks as to put into operation the doctrine of res adjudicata? Was the plaintiff silent when he should have spoken? If he knowingly permitted without objection payment of a part of the sum claimed to the Guaranty Company's receiver, will he or not be compelled to rebate from his claim against the defendant, if he has a valid claim against it, or, as claimed by the defendant, forego the whole of it? If the money paid by the defendant to the Guaranty Company or its receiver was in fact a part of the property that belonged to the Alabama Trust & Savings Company, are or are not the creditors whom Sterrett represents remitted to the case in which the Receiver of the Guaranty Company was appointed to recover a part or the whole of what is due to them respectively. May not the defendant rightfully plead not only res adjudicata, but in the alternative, if such a defense can not be made out, that it is entitled to credit for what was paid to the Guaranty Company and that the creditors of the Alabama Trust Company must look to the Receiver of the Guaranty Company? If this should prove to be so and if the conveyance of September, 1909, is to be shown fraudulent, then is not the Guaranty Company or its Receiver a necessary party, if under the federal rule jurisdiction can be acquired over such company or Receivers? Queries of the character above mentioned (none of which are now decided) have come forcibly to my mind in view of an examination of authorities, some of which are Jones, Insolvent Corp., Secs. 192 and 542 (citing 121 Wis., 127); Thompson, Corp., 1st Ed., Sec. 6550; 10 Cyc. 1266-1268; Note to 103 Am. St. Rep., 552, 563; Chattanooga R. & C. R. Co. v.

Evans, 66 Fed. Rep., 809, C. C. A., 6; McIver v. Young Hardware Co., 119 Am. St., 970 (144 N. C., 478), etc. The rights of the parties in interest require a full trial of this case.

The plaintiff may amend its bill to conform to the facts and situation, if it so desires, on or before June 12. The defendant, if the plaintiff so amends, may file an answer to such amended bill on or before June 29. If he does not so amend, the defendant may file an amended answer by that date, setting up the additional defenses which it desires to make. The replication may be filed on or
19 before July 10. The parties will then proceed to take such additional evidence as may be required, all of which will have to be completed by September 1. The last ten days of the time for taking evidence will be reserved for the taking of evidence in rebuttal. The residue of the allotted time will be divided equally between the parties for the taking of such evidence as they respectively wish to offer.

The case ought to go to a Master on account of the accounting and other detail work which will be necessary, and counsel are invited to confer with the court on that subject on June 5, at 2:30 o'clock P. M., at the District Court Chamber in Cincinnati, Ohio.

Motion of Defendant.

(Filed June 5, 1914.)

Now comes the defendant, by its counsel appearing in that behalf, and moves the Court to dismiss the bill herein for the following reasons:

1. For defect of parties and want of equity, because it appears from the proofs that The Alabama Trust & Savings Company transferred all its assets and claims including those asserted in the bill of complaint herein on September 25, 1909, to The City Bank & Trust Company, which latter Company is a proper and necessary party to this action.

2. The plaintiff claims said transfer of assets was fraudulent, but tenders no such issue in the pleadings and does not support the same in the proofs.

3. The testimony is too indefinite and insufficient to enable the Court to determine either the equities involved herein or state the account between the parties.

And the said defendant, by counsel as aforesaid, also moves the Court, in the alternative, if the petition be not dismissed for
20 this and other reasons apparent on the record, to reopen the case, with leave to the parties to so amend the pleadings as to raise all the issues necessary to properly present the whole case, and to take further testimony in that behalf, and fix the time in which the same may be done.

Order.

(Entered by Judge Sater June 5, 1914.)

This cause came on this day to be heard upon the pleadings and the proofs, and the defendant's motion in open court to dismiss the bill for defect of parties, want of equity and failure of proof to sustain plaintiff's bill, or, in the alternative, to re-open the case with leave to the parties to so amend the pleadings as to raise all the issues necessary to properly present the whole case, and to take further testimony in that behalf; and the same having been argued by counsel and submitted, the Court, being fully advised in the premises, finds that the part of said motion which is directed to the dismissal of the bill is not well taken and therefore denies the same; to all of which defendant, by its counsel, duly excepts, and the Court further finds that so much of said motion is well taken as is in the alternative, as above stated: Wherefore, it is considered, ordered and adjudged that the plaintiff, if he so desires, is hereby granted leave to amend his bill on or before June 12th, 1914, and the defendant, if the plaintiff so amends, is granted leave to file an answer to such amended bill on or before June 29th, 1914, and if the plaintiff does not so amend, the defendant in that event is granted leave to file an amended answer or other pleadings by June 29th, 1914, setting up such additional defenses as it desires to the bill as it now stands; and leave is granted the plaintiff to file his replication on or before July 10, 1914; provided, however, if the plaintiff should not see fit to amend his
21 bill, on or before June 12th, the defendant may, before further pleading, renew his motion to dismiss.

And it is further ordered, adjudged and decreed that, upon the issues thus joined, the parties are granted leave until September 1, 1914, to take such additional testimony as they may desire and deem necessary to properly present the whole case, the time to be divided equally between the parties, with the exception of the last ten days prior to September first, which are reserved for the taking of evidence in rebuttal.

Amended Bill of Complaint.

(Filed June 10, 1914.)

Comes W. C. Sterrett, as Receiver of Alabama Trust & Savings Company, and, by leave of the Court first had and obtained, amends his Bill of Complaint heretofore filed in said court against The Second National Bank of Cincinnati so as to make said bill read as follows:

In the District Court of the United States for the Southern District of Ohio, Western Division.

W. C. STERRETT, as Receiver of Alabama Trust & Savings Company, an Insolvent Banking Corporation, Complainant,

vs.

THE SECOND NATIONAL BANK OF CINCINNATI, a National Banking Association, Defendant.

W. C. Sterrett, who is a citizen of the State of Alabama, over twenty-one years of age, residing at and whose place of abode is at Birmingham, Jefferson County, Alabama, in the Southern Division of the Northern District of the State of Alabama, as and who is Receiver of Alabama Trust & Savings Company, as hereinafter stated, brings this bill of complaint pursuant to and in accordance with the provisions of Section 3509 of the Code of Alabama of 1907 and the orders and decrees to him directed by the Chancery Court of Jefferson County, Alabama, copies of which are hereto attached,
22 marked Exhibits 1 and 2, and made parts hereof, and the authority in him so vested, against The Second National Bank of Cincinnati, a national banking association, organized and existing under the laws of the United States relating to such national banking associations, a citizen of, residing, having its principal place of abode, and doing business at Cincinnati, in the County of Hamilton, and an inhabitant of the Southern District of the State of Ohio, a citizen of, residing in the Southern District of the State of Ohio. And therefore your orator complains and says:

1. That said Alabama Trust & Savings Company, some years prior to the year 1908, was organized under the laws of the State of Alabama into a banking corporation, with an authorized and paid up capital stock of, to-wit, $100,000.00, divided into 1,000 shares of the par value of $100.00 each, and as such, from the time of its organization, did a general banking business, with its principal place of business and its residence in Birmingham, Jefferson County, Alabama, until it closed its do-rs and discontinued business under the circumstances hereinafter set forth, on or about the 25th day of September, 1909.

2. That, to-wit, in the latter part of September or in the first part of October, 1908, Ben T. Head, desiring to purchase said 1,000 shares of the capital stock of said Alabama Trust & Savings Company (for brevity, hereinafter called the Savings Company) from the then owners thereof, to-wit, E. N. Cullom and others, for the price of, to-wit, $100,000.00 applied to said Second National Bank of Cincinnati (for brevity, hereinafter called the Cincinnati Bank) for a loan of that sum for that purpose, which was made, and for which said Head gave the said Cincinnati Bank his note or notes for, to-wit, $100,000.00, secured as collateral by said 1,000 shares of stock so purchased with the proceeds of said loan. Afterwards, to-wit, sometime during the latter part of the year 1908, or early in the year 1909, Gus T. Brannon and Ector H. Smith bought said Head's said stock

in said Savings Company, for, to-wit, $100,000.00, and by agreement with him and said Cincinnati Bank gave their note or notes for that sum, in lieu of the said note or notes of the said Head, and secured the same by a pledge of the said 1,000 shares, the net result of which was that said Cincinnati Bank accepted the said obligation of said Brannon and Smith in lieu of that of said Head and retained the same 1,000 shares of stock as collateral security therefor. That
23 shortly thereafter said Brannon and Smith paid on said $100,000.00 indebtedness to said Cincinnati Bank, to-wit, $15,800.00, and said Cincinnati Bank released and surrendered to them, to-wit, 158 of said shares, retaining, to-wit, 842 shares to secure the balance of, to-wit, $84,200.00. Afterwards, and before, to-wit, May 1, 1909, said Ector H. Smith and Gus T. Brannon, directly or indirectly, sold at, to-wit, par 542 of said 842 shares as follows, to-wit:

To W. K. Smith	100 shares
To Enos R. Stewart	150 shares
To J. R. Lewis	50 shares
To Tom Stobert	100 shares and
To Interstate Securities Co.	142 shares
	542 shares

And said purchasers, by agreement with said Cincinnati Bank, in lieu of said note or notes of said Gus T. Brannon and Ector H. Smith, or renewals thereof, for said balance of, to-wit, $84,200.00, gave their separate, several notes each respectively secured by separate pledge as collateral security therefor of the said respective portion of the maker of said 842 shares so asquired, divided and reissued to each respectively as follows, to-wit:

Name of maker of note.	Amount of note.	Number of shares.	Par-value.
Gus T. Brannon	$15,000.00	150	$15,000
Ector H. Smith	$15,000.00	150	$15,000
W. K. Smith	$10,000.00	100	$10,000
Enos R. Stewart	$15,000.00	150	$15,000
James R. Lewis	$ 5,000.00	50	$ 5,000
Tom Stobert	$10,000.00	100	$10,000
Interstate Securities Company.	$14,200.00	142	$14,200
Total	$84,200.00	842	$84,200

That when said Head obtained said original loan it was, in substance, agreed or understood by and between him and said Cincinnati Bank that the said Cincinnati Bank should become the Cincinnati correspondent of said Savings Company, and that through the control and domination of the said Savings Company and its affairs by said Head and his associates deposits and assets of the said Savings Company, equal to or greater than the said indebtedness, should be transferred or given over to the said Cincinnati Bank, with authority given to said Cincinnati Bank to charge the said note or in-
24 debtedness of the said Head, or any part of it, to the account of the said Savings Company; and in pursuance of such agree-

ment or understanding, and by reason of the domination and control of said Savings Company by said Ben T. Head he, on, to-wit, October 3, 1908, caused to be so transferred or given over to the said Cincinnati Bank, to-wit, in cash or its equivalent, to-wit, $135,000.00 of the then total assets of the said Savings Company, which were less than, to-wit, $158,000.00; and on, to-wit October 10, 1908, procured to be entered upon the minutes of the said Savings Company, and to be transmitted to the said Cincinnati Bank, a resolution certified by him as President and by Ector H. Smith as Secretary pro tem, a substantial copy of which is hereto attached, marked Exhibit 3, and made a part hereof.

That shortly after said 158 shares were so released and surrendered to said Gus T. Brannon and Ector H. Smith such 158 shares, or a great part thereof, were by them sold and transferred to divers and sundry persons, who had no notice of the wrongs and injuries committed by said Cincinnati Bank herein complained of, and as against all of said wrongs and injuries they were and are bona fide purchasers for adequate value without notice; and their claims as such stockholders remain still outstanding and are wholly unsatisfied. That when said W. K. Smith, Enos R. Stewart, J. R. Lewis and Tom Stobert so became stockholders of said Savings Company, its official organization was changed so as to be as follows, to-wit:

Gus T. Brannon, President,
Ector H. Smith, Vice-President,
J. R. Lewis, Secretary and Treasurer,
Tom Stobert, Cashier; and
Gus T. Brannon, Ector H. Smith, W. K. Smith, Enos R. Stewart, J. R. Lewis and Tom Stobert, Directors,

of which said Cincinnati Bank became informed and well knew.

3. That afterwards, to-wit, on May 1, 1909, in the conduct of such business with said Cincinnati Bank said Savings Company had to its deposit account with said Cincinnati Bank a credit checking balance of a large sum, to-wit, $17,200.00, or more. That said Gus T. Brannon was at that time President of said Savings Company and its notes were, in the ordinary transaction of its business, executed by it through him acting in that official capacity. Such being the relative situation of said two banks and of said officers of said Savings
25 Company in their individual relations with and to said Cincinnati Bank, the latter Bank, by and through E. E. Galbreath, who was then its officer and agent, conceived the plan and formed the design of inducing and procuring said officers of said Saving Company, who had the domination, control and management of its business and affairs, to still further abuse the trust and confidence so exercised and reposed in them by said innocent stockholders and the creditors of said Savings Company to the mutual advantage of themselves and of said Cincinnati Bank and to the injury of said other innocent stockholders and of the then existing and subsequent creditors of said Savings Company, which it successfully accomplished in the manner hereinbefore and hereinafter set out in this Bill of Complaint, to-wit: It sent E. E. Galbreath, who was at the time its president or vice-president, to Birmingham, Alabama, who

persuaded and induced said officers of said Savings Company in lieu of their respective notes and that of said Interstate Securities Company to it, aggregating, as aforesaid, to-wit, $84,200.00, to issue notes in the same several amounts, purporting to be the demand notes and obligations of said Savings Company as maker, which notes, respectively, were endorsed by them respectively as follows, to-wit:

Amount of note.	Endorsed by:
$15,000.00	Gus. T. Brannon,
$15,000.00	Ector H. Smith,
$10,000.00	W. K. Smith,
$15,000.00	Enos R. Stewart,
$ 5,000.00	James R. Lewis,
$10,000.00	Tom Stobert,
$14,200.00	Interstate Securities Co.

And each such endorser allowed to remain as pledged as collateral security therefor the same respective shares of stock which he and it had, respectively, so previously pledged to secure his or its debt to said Cincinnati Bank. That said Savings Company did not authorize the execution of said notes, nor did it have charter power so to do had it attempted in its corporate capacity to so bind itself in such manner as maker of notes purely for the accommodation of its said officers and stockholders, or if said Savings Company as a corporate entity executed said last described notes, their execution was a part of the plan and scheme to hinder, delay and defraud the innocent stockholders and creditors of said Savings Company. At or about the same time,
26 and as part of said scheme and plan to defraud, the said Cincinnati Bank induced the said officers of said Savings Company to fraudulently transfer or otherwise fraudulently give over to it as collateral security for said last described notes, aggregating, to-wit, $84,200.00, property or assets of said Savings Company, to-wit, notes, bonds, claims demands and securities receivable of large value, to-wit, $72,557.19, a substantially correct schedule of which, showing, as nearly as plaintiff can ascertain, the names of the debtors, the amounts owing by each respectively, and when due, is hereto attached, marked Exhibit 4, and made a part hereof. And then, or shortly thereafter, the said Cincinnati Bank as a part of such plan or scheme to defraud induced the said officers of said Savings Company to transfer or otherwise give over to it as collateral security or other property or assets of said Savings Company, to-wit, notes, bonds, claims, demands and securities receivable of large value, to-wit, $60,038.05, a substantially correct schedule of which, as nearly as plaintiff can ascertain, showing the names of the debtor, the amounts owing by each respectively, and when due is hereto attached, marked Exhibit 5, and made a part hereof, and also still other property or assets of said Savings Company, to-wit, notes, bonds, claims, demands and securities receivable of divers and sundry debtors of said Savings Company in divers and sundry amounts, the names of which creditors and the amounts of which are unknown to plaintiff, but are well known to said Cincinnati Bank, aggregating in value and amount a large sum, to-wit, $40,000.00, or more. The object and purpose of said Cincinnati Bank in so persuading and inducing the

signing, endorsement and delivery to it of said new notes, and the transfer or giving over to it of said notes, bonds, claims, demands and securities receivable, was thereby, through such breach of duty and malfeasance of said officers of said Savings Company, to obtain apparently valid notes of said Savings Company to serve as an excuse or claim of right for the diversion and misapplication of the said notes, bonds, claims, demands and securities receivable which so came into its possession belonging to said Savings Company and held by it in trust as hereinbefore and hereinafter more fully set forth, and thereby to hinder, delay and defraud said innocent stockholders of said Savings Company and its then existing and subsequent creditors, of their respective interests in said Savings Company and its assets and of their just claims and demands. The said checking deposit credit and said collaterals, notes, bonds, claims,
27 demands and securities receivable of the said Savings Company, so wrongfully placed in the possession of the said Cincinnati Bank on or before and subsequent to the time said Gelbreath came to Birmingham, as aforesaid, on or about the 1st day of May, 1909, amounted in value in the aggregate of, to-wit, $189,795.24, or more, none of which it ever turned back to, surrendered, paid, or accounted for to said Savings Company, or to this plaintiff, its Receiver.

4. That having so obtained said last described notes aggregating, to-wit, $84,200.00, purporting to be executed by said Savings Company as maker and endorsed, as aforesaid, said Cincinnati Bank, shortly after the return to Cincinnati of its said representative, E. E. Galbreath, charged off said checking deposit credit balance of said Savings Company and credited $10,000.00 thereof upon the said note for $15,000.00 endorsed by said Gus T. Brannon, and, to-wit, $7,200.00 upon said note endorsed by said W. K. Smith; and said Cincinnati Bank still keeps and withholds said $17,200.00 deposit balance, or money, as if it was and should have been rightfully applied on said two notes last hereinabove described, but which in equity and good conscience is still the property and estate of said Savings Company and is held by said Cincinnati Bank in trust, or as a trustee in invitum, for this plaintiff as its Receiver. That from said collaterals, notes, claims and demands receivable, the property, as aforesaid, of said Savings Company and where were so transferred or given over to said Cincinnati Bank, aggregating in value and amount said total sum of $172,595.24, or more, and so in law held in trust by it for said Savings Company, said Cincinnati Bank has, from time to time, collected large sums of money, the amounts, from whom and when this plaintiff does not know and can not ascertain, but which are well known to said Cincinnati Bank, and which in equity and good conscience it should be compelled to disclose, discover and account for to this plaintiff as such receiver of said Savings Company. That plaintiff is informed and believes, and, upon such information and belief, alleges the fact to be, that said Cincinnati Bank has so collected and received in its said fiduciary, or quasi fiduciary, capacity sums aggregating, to-wit, more than $75,000.00. That orator does not know what disposition, if any, said Cincinnati Bank has made of such of said notes, bonds, claims, demands and

securities receivable of said Savings Company it so received, but in equity and good conscience it should be decreed to discover and disclose particularly and minutely of what said securities consisted; what it has collected thereon; when and from whom, and to fully account to Complainant for all such amounts collected, with interest, and to deliver to him in specie all such as have not been collected by it; and if it has disposed of any part thereof, to account to and pay to plaintiff the full value thereof at the time of the commission of said frauds and breaches of trust, with interest, irrespective of what price it may subsequently have received therefor.

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5. That about or soon after the time said Ector H. Smith and Gus T. Brannon became substituted for said Ben T. Head in said original transactions between said Head and said Cincinnati Bank, a plan was conceived, in which the said Ben T. Head and said Cincinnati Bank participated, of fraudulently organizing a new bank under the General Laws of the State of Alabama, which was, as hereinafter shown, successfully accomplished. Whether it was or was not at that time designed by said Ben T. Head and said Cincinnati Bank to use the entity of such new bank for the purpose of more effectively consummating the frauds herein complained of upon the then existing and subsequent creditors of said Savings Company and upon such persons as subsequently became innocent purchasers of any of its said stock, said new bank so fraudulently organized was by said Ben T. Head, with the concurrence and participation of said Cincinnati Bank, used as an instrument or vehicle for the successful accomplishment of such fraudulent purpose as will hereinafter more fully appear. Accordingly, on or about, to-wit, December 29, 1908, under color of the General Laws of the State of Alabama the said City Bank & Trust Company (hereinafter, for brevity, called City Bank or Guarantee Bank) was so fraudulently organized as authorized to do a general banking business under the General Laws of the State of Alabama, with its office and place of business and residence at Birmingham, Jefferson County, Alabama. That said Ben T. Head as the leading spirit, with the active assistance and co-operation of said Cincinnati Bank, and his two brothers, to-wit, R. C. Head and J. S. Head, Jr., under the said General Laws of the State of Alabama, organized the said City Bank & Trust Company on or about December 29, 1908, with a capital stock of $100,000.00, which in the organization papers was represented as having been fully paid up in cash, whereas, as a matter of fact, none or only an inconsiderable portion thereof was paid either in cash or its equivalent. At the time of, and as a part of such scheme of fraudulent organization of said City Bank, said "R. C. Head, Agent," gave the said Cincinnati Bank his note

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for $75,400.00 and to said City Bank & Trust Company a check on said Cincinnati Bank for $75,400.00, the amount of his subscription for capital stock of said City Bank & Trust Company, which check or draft with other items of similar nature, amounting to a total of, to-wit, $100,000.00, was sent to the said Cincinnati Bank for credit of said City Bank, none or only a small and insignificant portion of which was really intended by the said Heads, or the persons who drew or issued the same, or by the said Cincinnati Bank, as representing or intended to represent money or its equiva-

lent as payment of said subscription of $100,000.00 in such organization of said City Bank. And the purpose and intent of the said Ben T. Head and his said associates and said Cincinnati Bank was to use such plan of simulated payment as a fraudulent method of showing compliance with the provisions of Sections 3446-3447-3542 and other provisions of the Code of Alabama relating to the organization of banking corporations under the General Laws of the State of Alabama. It was agreed or understood between the said Ben T. Head and the said Cincinnati Bank, as a part of such plan and scheme of fraudulent organization, that, although such credit of $100,000.00 should appear as an entry on the books of the said Cincinnati Bank, the business of the said City Bank should be conducted, and was conducted, with said Second National Bank of Cincinnati and that the said Second National Bank of Cincinnati might charge same, or at least as much as $75,400.00 thereof, to the account of said City Bank at any time; and in pursuance of such agreement or understanding on, to-wit, January 4, 1909, to-wit, ten days before the said City Bank was opened up for business, at a meeting of the board of directors of said City Bank, the minutes of which meeting were signed by "Ben T. Head, President," and by "R. C. Head, Secretary," the following resolution was passed:

"That we hereby authorize the Second National Bank of Cincinnati, Ohio, to charge to our account, at any time that it appears to them that it is to their interest to do so, the note of R. C. Head, Agent, of $75,400.00 or any part of it that may remain unpaid at the time. Motion carried unanimously."

And on the same day the said "Ben T. Head, President," wrote the following to G. W. Williams, Cashier of said Cincinnati Bank:

"DEAR SIR: As per you- request, I enclose you herewith resolution adopted by the Board of Directors of the City Bank & Trust 30 Company, held this day. If this does not meet with your approval please send me a copy of the form you want and we will gladly conform to your wishes."

To which the said G. W. Williams, as such Cashier of said Cincinnati Bank, replied under date of January 6, 1909, as follows, to-wit:

"DEAR SIR: I have your favor of the 4th instant, enclosing resolutions of your Directors covering $75,400.00 note. I notice you have omitted putting the seal of the bank on the resolution. However, we will not return it for that purpose.

* * * * * * *

Hoping your efforts will prove successful in the interest of your new institution, and with personal regards, I beg to remain, Yours very truly."

The said City Bank at the time of its organization elected said Ben T. Head its president, which office he held until sometime subsequent to September 27, 1909, and during the entire time dominated and controlled the management and affairs of the said City Bank; and during said time the said City Bank carried on regular business with said Cincinnati Bank as the Cincinnati correspondent,

6. That the said City Bank & Trust Company was never, from the time of its organization, solvent, or if solvent at the beginning of its organization in the sense that its liability to creditors did not exceed its real assets, it soon thereafter became insolvent in that sense, and continued so to be from that time forth. That by reason of the said manipulation of its notes, bonds, claims, demands and securities receivable by said Cincinnati Bank and by said Head and his said successors in the management and control of said Savings Company on or prior to the said time when the said E. E. Galbreath, as the representative of the said Cincinnati Bank, came to Birmingham and procured the issuance in the name of the Savings Company as maker of said notes, aggregating, to-wit, $84,200.00, the said Savings Company had become insolvent, but in such insolvent and crippled condition continued to do business until to-wit, September 25, 1909, when it closed its doors permanently under the circumstances and by reason of the causes hereinabove and hereinafter set forth. On, to-wit, said 25th day of September, 1909, the said Ector H. Smith, then, as vice-president, having in charge and control the ordinary business and affairs of the said Savings Company, and the said Ben T. Head having in charge, as aforesaid, the business and affairs of the said
31 City Bank, with the consent, if not with the active co-operation and advice, of the said Cincinnati Bank, signed a paper, copy of which is hereto attached, marked Exhibit 6; and thereupon the said Ector H. Smith caused the doors of the said Savings Company to be closed, caused it to discontinue further business and gave over into the possession of the said City Bank all of its books and records, and all of its remaining assets which had not so previously been transferred or given over to the said Cincinnati Bank, as aforesaid. It was agreed and understood between the said Ector H. Smith and the said City Bank, so represented by the said Head, that the said item therein described as "$10000 C of D and 12 mos at 4%" represented the certificate of deposit which was then and there issued as a part of the said transaction, said $10,000 to be the property, not of the said Savings Company, but that amount in money evidenced by such certificate of deposit to be paid by said City Bank to said Ector H. Smith and other officers of said Savings Company for their individual use and benefit. That as a part of the said transaction the said Ector H. Smith was to be immediately taken in to the said City Bank & Trust Company as its vice-president, at a salary of, to-wit, $2,500.00 per annum; and he did, accordingly, immediately so take employment with said City Bank. That one Chas. M. Spencer, who was at the time an employe of said Savings Company, would be, and he was, taken in as a part of said transaction as an employe of the said Savings Company, at a salary of, to-wit, $150.00 per month. That the said James R. Lewis, who was at the time, as aforesaid, a director of said Savings Company, should be thenceforth paid by the said City Bank the sum of, to-wit, $112.50 per month. At that time both the said Savings Company and the said City Bank were insolvent, and of the insolvency of each the other had notice and of the insolvency of both the said Cincinnati Bank had notice. That before or at the time of the said transaction so had in the name of said Savings Company by Ector H. Smith, as its Vice-President, and of said City Bank

& Trust Company, through its said President Ben T. Head, the said Cincinnati Bank was consulted and its consent obtained for the consummation of the fraud; and so of such giving over of such remaining assets of the said Savings Company by its faithless Vice-President, Ector H. Smith, to the said City Bank. At the time of the consummation of the said fraudulent acts, on or about September 25th-27th, as aforesaid, a cause of action on behalf of the creditors
32 of the said Savings Company, and in the name of the Company on behalf of the innocent purchasers of stock of said Savings Company, had already arisen and still exists for enforcement in this plaintiff as such receiver of said Savings Company. The said transaction of September 25th-27th constituted and constitutes but an additional and superadded grievance. It was not within the competence of the said guilty persons or parties through such acts to defeat or take away such existing cause of action; but such acts and transactions of September 25th-27th were but an additional fraud upon said innocent stockholders and creditors; and it was intended thereby by said participants in said transactions of September 25th-27th to take away from the said Savings Company all of its said remaining assets and to deliver the same over to the said City Bank for its use and benefit, and for the individual benefit of the said Ector H. Smith and others, as aforesaid, leaving the debts of the said Savings Company unpaid and depriving the said innocent stockholders of their equitable rights and interests as such in such remaining assets so given over to said City Bank by said Ector H. Smith. A large amount of said debts of the said Savings Company still remains unpaid, including debts which existed prior to, to-wit, May 1, 1909, among which is a debt of said Savings Company to Tuskegee Land & Security Company of, to-wit, $5,000.00, which arose, to-wit, February 10, 1909, evidenced by time certificate of deposit given by said Savings Company to said Tuskegee Land & Security Company for $5,000.00 on, to-wit, February 10, 1909, and payable, with 4% per annum interest from that date, on, to-wit, January 1, 1911.

7. That since, to-wit, October 3, 1903, there has been and still is of force in Alabama a statutory law of that State known as Section 3509 of the Code of Alabama of 1907, which reads as follows:

"3509. Marshalling Assets of Insolvent Corporations.—The assets of insolvent corporations constitute a trust fund for the payment of creditors of such corporations, which may be marshalled and administered in courts of equity in this state."

Pursuant to said statute and the laws of Alabama, on, to-wit, July 21, 1910, Kate Rowland and Frank Matson, as and who were creditors of said Savings Company, filed a bill in the Chancery Court in and for the Fifth District of the Northwestern Chancery Division of the State of Alabama, comprising said County of Jefferson,
33 the same being a court of record and of general equity jurisdiction of and in the State of Alabama, copy of which is hereto attached, marked Exhibit 7, and made a part hereof. The said Alabama Trust & Savings Company was served with process and brought into court, to-wit, July 23, 1910, as a defendant to said bill, and appeared and demurred thereto, to-wit, August 8, 1910. Afterwards, on, to-wit, the 27th day of September, 1910, said bill was

amended by amendment, copy of which is hereto attached, marked Exhibit 8. The parties respondent to said bill, as so amended, were personally served with process and brought into said court and said suit was so regularly prosecuted as that, on, to-wit, the 27th day of April, 1911, a general administration decree was therein rendered by said court, copy of which is hereto attached, marked Exhibit 1, and made a part hereof; and in accordance with said decree, this plaintiff immediately qualified as and continued to be such receiver, and the administration of the estate of said Savings Company is still in progress in and under said Chancery Court of the State of Alabama.

8. Under and by virtue of the said Section 3509 of the Code of Alabama of 1907 and of the statutory laws of said State covering such banking corporation organized under its General Laws, and of the said bill of the said creditors of said Savings Company, filed, as aforesaid, and of the said decrees of the said Chancery Court of Alabama, when the said bill was filed, as aforesaid, July 21, 1910, it, said Chancery Court of Alabama in the said suit of said Kate Rowland and Frank Matson acquired the exclusive jurisdiction of all of the assets of the said Savings Company, including the rights of action set forth in this Bill of Complaint, the proceeds of which, if successful, constitutes a trust fund for the payment of the creditors of said Savings Company, to be marshalled and administered by said Chancery Court of Alabama in said suit of Kate Rowland et al.; and this plaintiff under the authority and direction of the said Chancery Court of Alabama in said suit, as shown by said decrees, copies of which are said Exhibits 1 and 2, has instituted and prosecutes this suit in this court.

9. That the said City Bank, to-wit, September 27, 1910, changed its name to, to-wit, Guarantee Bank & Trust Company, but without change of its corporate identity, and without in any way bettering its financial condition; and being and so continuing to be insolvent, on, to-wit, the 5th day of October, 1910, on the bill filed in the same Chancery Court of Alabama by the Hon. Alex. M. Garber, as
34 Attorney-General of the State of Alabama, in pursuance of the statutes of that State, the said City Bank & Trust Company, then named Guarantee Bank & Trust Company, was placed in the hands of a receiver, E. D. Smith, then and who still continues to be a resident citizen of, domiciled and having his place of abode in Birmingham, Jefferson County, Alabama, in the Southern Division of the Northern District of Alabama; which suit, with the said E. D. Smith as receiver therein, is still pending in said Chancery Court of Alabama. If the said E. D. Smith, as such receiver, be a proper party to this suit, he is not within the jurisdiction of this court. The said City Bank & Trust Company, from the time of its organization was and is a resident citizen of Birmingham, Jefferson County, Alabama, at which place it had its principal place of business and abode until it closed its doors and went into receivership, as herein alleged, since which time it has not transacted any business or had any office; and if it be a proper party in this proceeding, it is not within the jurisdiction of this court.

10. That, except as to the proceedings in said Chancery Suit of Kate Rowland et al., this plaintiff has no personal knowledge of the

facts herein alleged; but is informed and believes, and, on such information and belief, alleges, that all of the allegations of fact and charges herein made are substantially true as alleged and charged; and that, where the allegations are of matter or facts not contained in the bill as originally filed, or are enlargements upon or more specific in averments of fact than is contained in said bill as originally filed, such additions, enlargements and more specific averments are from information obtained by plaintiff since said original bill was filed, and chiefly through and from the evidence already taken in this case.

Prayer.

To the end, therefore, that this plaintiff may have that relief which he can obtain in a court of equity, and that the said defendant, Second National Bank of Cincinnati, may answer the premises, but not upon oath or affirmation, an answer under oath being hereby expressly waived by plaintiff, he now prays the court:

I.

To grant unto this plaintiff an order requiring said Second National Bank of Cincinnati, a national banking association, thereby commanding it at a certain time, and under a certain penalty
35 therein to be limited, to appear before this Honorable Court and then and there full, true, direct and perfect answer make to all and singular the premises, and to stand, perform and abide by such order, direction and decree as may be made against it in the premises, as shall seem meet and agreeable in the premises.

II.

That it be required to set forth, specify and produce all notes and other documents in its possession or under its control, evidencing or purporting to evidence any debt or obligation of said Alabama Trust & Savings Company, whether valid or invalid, paid or unpaid, and particularly all notes and other documents purporting to have been made by, or to constitute an obligation of said Savings Company; that said notes or obligations purporting to have been made by it as maker described in numbered paragraph 3 supra, and all renewals thereof, and all substitutes therefor be decreed to be, as to said Savings Bank and your plaintiff, invalid and of no effect, and be decreed to be canceled and surrendered.

III.

That it, said Cincinnati Bank, be compelled and required to account to your plaintiff, as such receiver, for all moneys, choses in action, notes, claims, bonds, stocks, evidences of debt, and other things of value which, as collateral security or otherwise, it at any time received from said Alabama Trust & Savings Company or from any and all agents and officers thereof, with interest, and for all moneys, choses in action, notes, claims, bonds, evidences of debt and

other things of value which were given over to said City Bank & Trust Company in said transaction of September 25-27th, 1909, which, or the proceeds of which, may then or subsequently have come into the possession or control or use of the said Cincinnati Bank, with interest, and to discover and disclose the same, describing them accurately and minutely, and to discover and disclose how and from, what and when received and what it has collected thereon and from whom, and how and when and in what sums, respectively, and to surrender up any it may have, and in such accounting to be charged with the value of all it may have disposed of, with interest, irrespective of what it may have received for such disposition thereof; and that in said accounting it be charged with said sum of $17,200.00 mentioned supra, and all other sums of money, debts, evidences of debt and other things of value received by it, or of which or of
36 the proceeds of which it had the use and benefit, with interest, and that a decree be rendered in favor of your plaintiff for such balance as, upon discovery and accounting, should in equity and good conscience be decreed to be paid by said Second National Bank of Cincinnati to your plaintiff.

IV.

That the defendant may set forth an account of all and of every sum and sums of money and other things of value received by it, or by any other person or persons by its order, or for its use or benefit for or in respect of its dealings with said Alabama Trust & Savings Company, or with any of its servants, agents, officers or employees, directly or indirectly, in which it had or has any interest or concern, and when and from whom and from what, in particular, all and every such sums and things of value, respectively, and for what, were received; and how the same, respectively, have been applied or disposed of; and that the defendant may be decreed to pay to the complainant, as such receiver, what shall be found due from the defendant to the complainant, as such receiver, and to deliver up to the complainant all documents in the defendant's possession or under their control, belonging to said Savings Company, or of which complainant should and ought to have possession; that the defendant pay the costs of this suit.

V.

And that your plaintiff may have such other and further relief, preliminary and final, as to the court may seem meet and proper, and which, in equity and good conscience, should be awarded him, and for costs.

PHILIP & S. C. ROETTINGER,
EDMUND H. DYER,
Solicitors for Complainant.

(Duly verified.)

Service of copy of this amended bill of complaint and the exhibits thereto is accepted on this the 10th day of June, 1914.

J. B. FORAKER,
Per J. SAGMEISTER,
Solicitors for the Defendant,
Second National Bank of Cincinnati.

EXHIBIT A.

In the Jefferson Chancery Court.

Mrs. KATE ROWLAND et al.

vs.

ALABAMA TRUST & SAVINGS CO.

37 Above cause coming on to be heard, was submitted for final decree upon the pleadings and proof as noted by the Register, and said cause being heard and understood by the Court, and the Court being of opinion that the Complainants are entitled to the relief prayed for:

It is ordered and decreed that Complainants are entitled to, and shall have, the relief for which they pray; that Defendant, Alabama Trust & Savings Co., is indebted to the Complainant Mrs. Kate Rowland, as alleged in the Bill, in the sum of $260.01, and to Complainant Frank Matson in the sum of $32.00; that Defendant is insolvent; that its assets constitute a trust fund for the payment of its creditors, and should be marshalled and administered in this Court; that Defendant is a corporation organized under the General Laws of Alabama; that defendant corporation upon final settlement should be dissolved, and that a receiver should now be appointed to administer its estate; that said Defendant has suspended business, and is not about to resume the same, and can not resume the same with safety to the public; that W. C. Sterrett be, and he is hereby, appointed receiver of Defendant, and empowered and directed to demand and take into his possession all of Defendant's assets and property to which it is entitled and to recover the same, to be reduced to money and administered under the further order of the Court, and, to that end, that the said receiver may employ counsel and may bring such actions at law or in equity as he may be advised and incur such expense as may be necessary as an incident thereto. He is directed to file an inventory of the assets of Defendant within sixty days after the enrollment of this decree, and may apply for such further orders herein as may be necessary.

Before entering upon the discharge of his duties, the said receiver is required to give bond in the sum of $25,000, payable to the Register, and with surety to be approved by the Register, conditioned to faithfully discharge his duties as such receiver.

It is further ordered that this cause be reserved for further order, marshalling and administering the assets of Defendant and allowing the claims of creditors herein.

This April 27, 1911.

(Signed) ALFRED H. BENNERS,
Chancellor.

Endorsed: Filed and enrolled April 27, 1911. J. W. Altman, Register in Chancery.

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EXHIBIT 2.

In the Chancery Court of Jefferson County.

Mrs. KATE ROWLAND et al.

vs.

ALABAMA TRUST & SAVINGS CO.

Above cause coming on to be heard upon the petition of W. C. Sterrett, as Receiver, filed herein on Feb. 1, 1912, and upon the Register's report thereon, and said matter being heard and understood by the court:

It is ordered and decreed that W. C. Sterrett, as Receiver herein of defendant, Alabama Trust & Savings Co., be, and he is hereby, authorized, at his discretion, to prosecute such suit or suits as may be necessary, and to take such steps and proceedings as he may be advised, to recover of Second National Bank of Cincinnati, its officers and agents, any and all such sums for which he may be advised they, or either of them, are liable to said Alabama Trust & Savings Co., or to said W. C. Sterrett, as such Receiver; and to recover any property in the possession or under the control of said parties, or either of them, which may belong to said Alabama Trust & Savings Co. or to which he may be entitled as such Receiver; and to assert against the said Second National Bank of Cincinnati, its officers and agents, or either of them, any legal or equitable claim which he may assert as such Receiver.

This 8th day of March, 1912.

(Signed) ALFRED H. BENNERS,
Chancellor.

Endorsed: Filed and enrolled Mar. 9, 1912. Henry Morscheimer, Register in Chancery.

EXHIBIT 3.

"Alabama Trust & Savings Company.

BIRMINGHAM, ALA., Oct. 10, 1908.

At a meeting of the directors of the Alabama Trust & Savings Company held this day at which all the directors of said company were present the following resolutions were adopted: Whereas, Ben T. Head of Birmingham, Alabama, has negotiated a loan for one hundred thousand dollars from the Second National Bank of Cincinnati, Ohio, and has attached to his note four certificates, 209, 210, 211 and 212, amounting to one thousand shares of stock in the Alabama Trust & Savings Company, and Whereas, to secure the Second National Bank of Cincinnati from any loss on said note.

Be It Resolved, that permission is hereby given to Second National

Bank of Cincinnati to charge said note, or any part of it, to
39 the account of the Alabama Trust & Savings Company, now a depositor in the Second National Bank of Cincinnati, upon three days' notice to the Alabama Trust & Savings Company.

I do hereby certify that the above is a correct copy of a resolution passed at a meeting of the directors of the Alabama Trust & Savings Company, held this 10th day of October, 1908.

(Signed) BEN T. HEAD,
President.
ECTOR H. SMITH,
Secretary pro tem."

EXHIBIT 4.

Name.	Amount.	When due.
Shelby Peevy Co.	$500.00	9-5-09
Shelby Peevy Co.	695.00	9-15-09
Bank of Red Bay, Red Bay, Ala.	5,000.00	11-1-09
Mrs. R. Wood	500.00	11-24-09
C. H. Butler	500.00	11-24-09
A. O. Lane	150.00	12-2-09
C. H. Butler	500.00	5-24-10
J. M. Kidd	1,000.00	5-25-10
J. S. & B. T. Head	2,575.00	6-22-09
Doan & Brewer	500.00	10-25-09
Hugh C. Crane	200.00	7-1-09
M. L. Carlisle	1,800.00	11-1-09
J. S. & B. T. Head	1,000.00	1-4-10
C. H. Bowles	5,300.00	12-28-09
Galloway & Fisherman (Grand United Order of Galilean Fisherman)	21,840.00	8-5-09
Carl Seay	100.00	11-1-09
Thos. Frazier Lumber Co.	174.25	Demand
Thos. Frazier Lumber Co.	181.83	Demand
Thos. Frazier Lumber Co.	199.00	Demand
Thos. Frazier Lumber Co.	194.84	Demand
Thos. Frazier Lumber Co.	129.68	Demand
Thos. Frazier Lumber Co.	136.35	Demand
W. L. Doan	300.00	10-14-09
James T. Gaudin	200.00	10-6-09
Charles P. Willis	250.00	5-24-10
Carl Seay	150.00	9-13-09
Alabama Coal & Ore Co.	501.32	9-1-09
N. O. Tyler Co.	1,479.50	6-24-09
American Advertising & Sale Co.	500.00	6-22-09
J. E. Bennett	425.00	7-21-09
J. P. Lawrence	150.00	7-26-09
W. E. Nichols	150.00	7-21-09
E. A. Smith	2,250.00	7-26-09
40 John E. Ellis	300.00	9-15-09
J. Jaffee	100.00	8-27-09

Name.	Amount.	When due.
loyd & Dean	2,000.00	8-19-09
. H. Hopkins	100.00	8-1-09
nith Cullom, Jr.	200.00	8-15-09
merican Advertising & Sales Co.	1,000.00	9-10-09
. J. Blackwood	45.00	Blank date
. J. Blackwood	45.00	Blank date
. J. Blackwood	37.50	Blank date
. J. Blackwood	37.50	Blank date
. J. Blackwood	30.00	Blank date
. J. Blackwood	30.00	Blank date
H. Floyd	1,000.00	10-18-09
H. Dean	1,000.00	11-18-09
rs. A. E. Powers	24.00	6-19-11
O. Griffith	60.00	Blank date
O. Griffith	60.00	Blank date
O. Griffith	48.00	Blank date
O. Griffith	48.00	Blank date
rs. A. E. Powers	24.00	6-19-10
O. Griffith	36.00	Blank date
rs. A. E. Powers	24.00	6-18-09
rs. A. E. Powers	24.00	12-19-09
rs. A. E. Powers	24.00	12-19-10
D. Ebersole	80.00	9-26-10
D. Ebersole	168.00	5 23-10
D. Ebersole	189.00	5-23-10
D. Ebersole	147.00	11-23-09
D. Ebersole	160.00	9-26-09
D. Ebersole	80.00	3-26-10
D. Ebersole	210.00	5-23-11
. C. Garrett	125.00	7-26-09
eo. H. Bodeker	100.00	7-12-09
J. Greer	500.00	11-12-09
M. Moreman	942.00	12-7-09
ordon Lushy	209.42	12-9-09
M. Cranford	375.00	11-15-09
L. McMahon	125.00	8-19-09
J. Brown	125.00	11-1-09
A. Hurst	115.00	10-1-09
hn J. Hester	400.00	12-1-09
C. Cull	250.00	5-24-10
nds Peevy	2,000.00	5-29-10
kman Fur. Company, 117 shares North Birmingham Trust & Savings Bank Stock par value $100.00; 25 shares Fayette County Bank Stock, par value $100.00	300.00	Blank date
H. M. Banning	1,250.00	12-28-09
W. S. Duff	1,000.00	12-28-09
E. Quinn	400.00	1-1-10
abama Paper Co.	400.00	8-6-09

Name.	Amount.	When due.
E. M. Pinckard	500.00	12-7-09
Burdick Corbin Co	350.00	10-3-09
Mrs. R. Wood	1,000.00	Blank date
G. R. Horton	125.00	11-31-09
W. J. Chitwood	125.00	12-1-09
A. A. Hurst	500.00	Blank date
W. A. Brown	250.00	Blank date
J. J. Greer	250.00	Blank date
Perry Clark	100.00	10-4-09
W. K. Wheelock	250.00	10-9-09
H. A. Rector	172.80	12-8-09
C. H. Butler	350.00	10-15-09
A. A. Pearson	189.00	11-1-09
C. B. Barnes	135.00	11-15-09
J. C. Green	108.00	11-15-09
F. F. Hawkins	100.00	11-15-09
G. M. Riser & Co.	1,040.00	11-29-09
G. R. Horton	125.00	11-30-09
J. A. Gardner	162.00	12-1-09
W. G. Chitwood	125.00	12-1-09
A. J. Smith	270.00	12-15-09
W. Thompson	324.00	12-15-09
J. P. Dean	108.00	12-25-09
G. C. Burns	97.20	12-25-09
G. M. Jordan	108.00	12-29-09
E. M. Harris	214.00	1-1-10

Name.	Due.	Amount.	Collateral.
B. F. Nicholls & C. H. Butler, Childersburg, Ala.	July 29-09	$105.00	
T. B. Perry & W. B. Foulkes	July 29-09	455.00	End. Schuyler H. Floyd.
R. E. Bowdon	Aug. 2-09	450.00	Mtge. attached.
Mrs. Lula P. Soper (End. W. H. Soper)	Aug. 10-09	4,000.00	Mtge. attached.
Huntsville Knitting Co. (End. H. H. Mayberry & W. I. Wellman)	Aug. 16-09	1,300.00	
Jas. R. Lewis (End. Jas. R. Lewis & W. A. Porter)	Sept. 20-09	350.00	
G. R. Riser, Childersburg, Ala., (End. J. W. Hughes & J. W. Thaxton)	Sept. 27-09	106.62	
C. D. Ebersole	Sept. 27-09	2,000.00	Mtge. attached.
Fred Johnson, Montgomery, Ala. (End. B. P. Hancock)	Oct. 1-09	183.00	
William Miles, Childersburg, Ala.	Oct. 5-09	200.00	Mtge. Note.
Vincent Mercantile Co.	Oct. 6-09	2,080.00	
G. M. Riser & Co., Childersburg, Ala.	Oct. 12-09	1,580.00	Collateral attached $2,166.56.
J. M. Kidd, Vincent, Ala.	Oct. 20-09	1,048.84	
W. D. Cosper & Co., Childersburg, Ala.	Oct. 25-09	1,000.00	Collateral attached $2,007.45.
43 Bank of Pheba	Nov. 1-09	3,105.00	Collateral attached $4,061.56.
B. A. Alford	Nov. 8-09	1,000.00	Mtge. attached $2,000.00.
J. M. Kidd, Vincent, Ala.	Nov. 15-09	500.00	Mtge. attached $525.00.
S. A. Morris, Oakman, Ala.	Nov. 15-09	200.00	Mtge. attached.
S. E. Elliott, Vincent, Ala.	Nov. 26-09	640.00	
C. H. Butler, Childersburg	Nov. 26-09	600.00	Mtge. attached $1,200.00.
T. J. & E. N. Martin, Vincent, Ala.	Dec. 2-09	265.00	
John C. Pugh (End. Security L. & Accident Ins. Co.)	Dec. 31-09	3,000.00	Mtge. attached.
C. D. Ebersole	Sept. 27-09	2,000.00	Mtge. attached.
Four contracts for the American Adv. Sales Co. for		$250.00	each.
T. J. Watson	Sept. 17-09	300.00	Coll. attached.

	Name.	Due.	Amount.	Collateral.
	American Adv. Sales Co.	Sept. 5-09	500.00	
	O. A. Gourdin	Sept. 17-09	150.00	Mtge. attached.
	B. C. Lighter, Hinds Peevy	Oct. 10-09	5,000.00	Mtge. attached.
	C. D. Ebersole	Apl. 27-10	500.00	Mtge. attached.
	C. D. Ebersole	Apl. 27-10	500.00	Mtge. attached.
	C. D. Ebersole	May 23-10	500.00	Mtge. attached.
	C. H. Butler, Childersburg, Ala.	Nov. 1-09	750.00	Coll. attached $1,500.00.
	I. C. Schroder, Vincent, Ala.	Jan. 1-10	536.00	Mtge. attached.
	M. L. Heath, Childersburg, Ala.	Nov. 2-09	427.00	Mtge. attached.
	W. C. Chancellor, Childersburg, Ala.	Oct. 5-09	266.62	Mtge. attached.
		Dec. 1-09	527.78	Mtge. attached.
44	Mrs. R. Wood	Oct. 15-09	1,000.00	Mtge. attached $2,000.00.
	B. A. Alford	Dec. 1-09	482.29	Mtge. attached $500.00.
	J. W. Gaither	Oct. 15-09	350.00	Mtge. attached $700.00.
	C. H. Butler	Nov. 15-09	600.00	Mtge. attached $1,200.00.
	C. H. Butler	Nov. 1-09	263.35	Mtge. attached $504.00.
	Butt & Tate, Childersburg	Oct. 15-09	254.66	Mtge. attached.
	B. L. Johnson, Vincent	July 2-09	250.00	
	Harry Jones	July 12-09	400.00	
	E. M. Johnson	July 11-	616.00	Coll. attached.
	J. A. McConnell, York	9-30	300.00	
	Oakman Fur. Co., Oakman	7-3	2,000.00	
	Wright Bros., Acton City	7-12	1,000.00	
	Farmers & Miners Merc. Co., City	8-10	600.00	Mtge. attached.
	Eula E. Smith & W. S. Smith, Woodlawn, Ala.	8-9-11	900.00	Mtge. attached.
	S. O. Griffith	5-23-11	600.00	Mtge. attached.
	C. D. Ebersole	11-23-10	600.00	Mtge. attached.
	C. D. Ebersole	6-19-11	500.00	Mtge. attached.
	Mrs. R. E. Powers			

E. J. Blackwood		2-10-12	750.00	Mtge. attached.
H. T. Stacey & H. J. Davies		7-17	100.00	
H. Peevy		7-8	195.00	Mtge. attached $390.00.
Willis Goldwaithe & C. D. Goldwaithe			300.00	
H. E. Chapin			300.00	
Robinson Lumber Co.			175.87	
	T. H. Layton & H. E. Chapin		150.00	
45	M. Porter Walker & S. H. Floyd		285.00	
	Paul Barnette, John E. Ellis.		200.00	
Percy Clark, Walter McAdory			150.00	
E. W. & A. W. Bell, H. M. Judge, Farm. & Miners Mer. Co., 9 notes $100.00 each			900.00	
A. O. Lane, 6 notes, $150.00 each			900.00	Mayberry end.
W. M. Edmonds, York, Ala.			520.00	
J. M. Kidd, Vincent, Ala.		12-1	1,000.00	
A. D. & C. O. Smith, Vincent, Ala.		12-15	250.00	Coll. attached.
Mrs. R. Wood, Childersburg, Ala.		Nov. 1st.	500.00	
G. M. Riser & Co.			1,000.00	Mtge. Notes.
M. L. Carlisle & R. M. Carlisle			20.00	
Enos. R. Stewart			4,320.00	
			$60,038.05	

46 EXHIBIT 6.

"This agreement entered into on this 25th day of September, 1909, by and between the City Bank & Trust Company and the Alabama Trust & Savings Company,

We propose as follows:

$10,000.00 C of D 1 and 12 mos. at 4%.

Ector H. Smith, Vice-President at $2,500.00.

Take over and liquidate

The Alabama Trust & Savings Company, and assume its liability to depositors—Bills payable.

To maintain the branches of said Bank in liquidation until January 1st, 1910.

Spencer at $150.00 mo. To go as long as desired.

Lewis at $112.50 mo. To go as long as desired.

Mr. Shelby a director.

Dated Birmingham, Alabama, September 25th, 1909. To take effect Monday, September 27th, 1909, at 2 P. M.

CITY BANK & TRUST COMPANY,
By BEN T. HEAD, *President*,
And Committee: BEN F. BARBOUR,
BEN T. HEAD,
GEO. M. WEBB,
JOHN WORTHINGTON.

Accepted:
ALABAMA TRUST & SAVINGS COMPANY,
By ECTOR H. SMITH,
Vice-President.

EXHIBIT 7.

In the Chancery Court of Jefferson County, Alabama.

MRS. KATE ROWLAND and FRANK MATSON, Complainants,

vs.

ALABAMA TRUST & SAVINGS CO., Defendant.

To Honorable Alfred H. Benners, Chancellor:

Your orators, Mrs. Kate Rowland and Frank Matson, exhibit this their bill against Alabama Trust & Savings Co., on behalf of themselves and all other creditors of Alabama Trust & Savings Co., and state the following facts as a basis for the relief hereinafter prayed:

(1) Complainants are each over the age of twenty-one years, and reside in Talladega County, Alabama. Defendant is a banking corporation organized under the General Banking Laws of the State of Alabama, and formerly had its principal place of business in Jefferson County, Alabama.

(2) Defendant is justly indebted to Mrs. Kate Rowland in the sum of Two Hundred and Forty-three & 70/100 ($243.70) Dollars, with interest thereon, due for money deposited with it by her on July 3, 1909, which debts is evidenced by a certificate of deposit, a copy of which is hereto annexed and made a part hereof as Exhibit A; and Defendant is indebted to Complainant Frank Matson in the sum of Thirty & 00/100 ($30.00) Dollars, due for money deposited by him with it on July 16, 1909, as evidenced by a certificate of deposit a copy of which is hereto annexed and made a part hereof as Exhibit B.

(3) That Defendant is insolvent and has suspended business; that Defendant is indebted to various and sundry persons other than Complainants in various large sums; that Defendant's assets constitute a trust fund for the payment of Complainants' and Defendant's other creditors, which should be marshalled and administered in this court.

(4) Complainants file this bill on behalf of themselves and all other creditors of Defendant, and invite such other creditors to make themselves parties hereto and to participate in the distribution of Defendant's assets and to file and propound their claims herein.

Premises considered, Complainants make Alabama Trust & Savings Co. party defendant hereto, and pray that process issue to it and that it be required to plead, answer or demur hereto as provided by law.

Complainants pray that pending the hearing hereof a receiver be appointed for the assets of said Alabama Trust & Savings Co., with such power and authority as the Court may direct, and that on a final hearing hereof such a receiver be appointed, and that the assets of Defendant may be decreed to constitute a trust fund for the payment of Defendant's creditors, and that same may be marshalled and administered herein; and Complainants pray for all such further, other and different relief as they may be entitled to hereunder, and for general relief.

(Signed) GEORGE HUDDLESTON,
Solicitor for Complainants.

NOTE.—Defendant is required to answer all of the allegations of this bill, as contained in Paragraphs 1 to 4 thereof, both inclusive, but not under oath, answer under oath being hereby expressly waived.

(Signed) GEORGE HUDDLESTON,
Solicitor for Complainants.

Endorsed: Filed in office July 21, 1910. J. W. Altman, Register in Chancery.

48 EXHIBIT A.

Certificate of Deposit.

CHILDERSBURG, ALA., 7/3, 1909. No. —.

Mrs. Kate Rowland has deposited in

Alabama Trust & Savings Co.

$243.70

Two Hundred Forty-Three & 70/100 Dollars

payable to Mrs. Kate Rowland or order on return of this certificate properly endorsed twelve months after date with interest at 5% per cent. per annum. No interest after maturity. Not subject to check

F. C. CULL,
Cashier.

EXHIBIT B.

Certificate of Deposit.

CHILDERSBURG, ALA., July 16, 1908. No. 5.

Mr. Frank Matson has deposited in

Alabama Trust & Savings Co.

$30.00

Thirty & No/100 Dollars

payable to Frank Matson or order on return of this certificate properly endorsed 12 months after date with interest at 5% per cent, per annum. No interest after maturity. Not subject to check.

F. C. CULL,
Cashier.

EXHIBIT 8.

In the Jefferson Chancery Court.

MRS. KATE ROLAND et al.

vs.

ALABAMA TRUST & SAVINGS CO.

Complainants, by leave of Court, amend their Bill by adding at the end of Paragraph 3 thereof the following:

"That Defendant has assets consisting of claims and choses in action due it and other personal property, a more particular description of which assets is unknown to Complainants, but the same are of

rge value, but are not equal in value to the amount of Defendant's ıbilities."

(Signed) GEORGE HUDDLESTON,
Solicitor for Complainants.

Filed in Office Sept. 27, 1910. J. W. Altman, Register in Chan-ry.

) *Answer to Amended Bill of Complaint.*

(Filed June 29, 1914.)

The answer of the Second National Bank, defendant, to the nended bill of complaint of W. C. Sterrett, as Receiver of the Ala-ama Trust & Savings Company, complainant.

This defendant now and at all times hereafter, saving to itself all nd all manner of benefit or advantage of exception or otherwise that an or may be had or taken to the many errors, uncertainties and nperfections in the said amended bill of complaint contained, for nswer thereto, or to so much thereof as this defendant is advised it s material or necessary for it to make answer to, answering, says:

It admits that W. C. Sterrett is a citizen of the State of Alabama, ver twenty-one years of age, residing at Birmingham, Jefferson ounty, Alabama, and that he brings his amended bill of complaint s Receiver of the Alabama Trust & Savings Company, and that the econd National Bank of Cincinnati, is a national banking associa-ion, organized and existing under the laws of the United States, with s principal place of business at Cincinnati, Ohio.

This defendant further admits that said Alabama Trust & Savings ompany was in the year 1908 a banking corporation, organized nder the laws of the State of Alabama, with its principal place of usiness at Birmingham, Alabama, with a capital stock of One Hun-red Thousand ($100,000.00) Dollars, and continued to do a banking usiness until on or about the twenty-fifth day of December, 1909.

This defendant further admits that on or about the second day of October, 1908, it loaned to Ben T. Head the sum of One Hundred Thousand ($100,000.00) Dollars, said loan being secured by one housand shares of the capital stock of said Alabama Trust and avings Company. This defendant avers that it had no knowledge s to how said Head became the owner of said stock, and had nothing hatever to do with the purchase thereof by him.

This defendant further says that afterwards and on or about Janu-ry 5th, 1909, it discounted for and at the request of the Alabama rust and Savings Company a certain note executed by Gus T. Brannon and Ector H. Smith, for the sum of One Hundred Thou-and ($100,000.00) Dollars, and applied the proceeds of said note, upon the direction of said Alabama Trust and Savings Com-pany and Gus T. Brannon and Ector H. Smith, to the pay-ment of said loan to Ben T. Head, as aforesaid, and that said ote was secured by 1,000 shares of the capital stock of said Alabama rust and Savings Company.

This defendant admits that said Brannon and Smith thereafter made partial payments upon said note, aggregating the sum of Fifteen Thousand, Eight Hundred ($15,800.00) Dollars, and that this defendant released and surrendered 158 shares of the capital stock of said Alabama Trust and Savings Company, held as collateral to said loan.

This defendant further says that it has no knowledge of the alleged sale of 542 shares of the capital stock of the Alabama Trust and Savings Company, as alleged in complainant's amended bill of complaint. This defendant denies that thereafter and before, to-wit: May 1st, 1909, it accepted the separate notes of W. K. Smith, Enos H. Stewart, J. R. Lewis, Tom Stobert, and the Interstate Securities Company, in lieu of the note of said Brannon and Smith, in the manner set forth in complainant's bill of complaint; that this defendant avers that it discounted for said Alabama Trust and Savings Company the following notes, to-wit: One note, executed by Gus T. Brannon, for Fifteen Thousand ($15,000.00) Dollars; one note executed by Ector H. Smith for Fifteen Thousand ($15,000.00) Dollars; one note executed by W. K. Smith, for Ten Thousand ($10,000.00) Dollars; one note executed by Enos R. Stewart, for Fifteen Thousand ($15,000.00) Dollars; one note executed by James R. Lewis, for Five Thousand ($5,000.00) Dollars; one note executed by Tom Stobert, for Ten Thousand ($10,000.00) Dollars; and one note executed by The Interstate Securities Company, for Fourteen Thousand, Two Hundred ($14,200.00) Dollars.

This defendant avers that said notes were payable to the Alabama Trust and Savings Company on demand and were endorsed by the Alabama Trust and Savings Company and discounted for it, at its request and in due course of business; that said several notes provided that protest, notice of protest and notice of non-payment were waived by the endorsers thereof; that by direction of the Alabama Trust and Savings Company the proceeds of said several notes were applied to the payment of said note executed by said Gus T. Brannon and Ector H. Smith.

51 This defendant admits and avers that at the time it made said original loan to said Ben T. Head, said Head agreed to use his influence for the purpose of securing for this defendant the Cincinnati account of said Alabama Trust and Savings Company, and that he would endeavor to influence said Alabama Trust and Savings Company to maintain deposit with this defendant during the life of said loan of the average amount of not less than One Hundred Thousand ($100,000.00) Dollars.

This defendant admits that on or about October 3rd, 1908, it received from said Alabama Trust and Savings Company a copy of a certain resolution, a copy of which it attached to the amended bill of complaint, and marked Exhibit 3. This defendant avers that it had no knowledge of the cause of the adoption of said resolution and had no participation in the same, and that it took no action under the provisions of said resolution, and that it did not at any time derive any advantage therefrom.

This defendant avers that it has no knowledge as to the sale of 158

shares of the capital stock of the Alabama Trust and Savings Company, as set forth in the complainant's amended bill of complaint.

This defendant further avers that it had no knowledge of the change in the official organization of said Alabama Trust and Savings Company, as alleged in plaintiff's amended bill.

This defendant admits that afterwards, to-wit: on or about May 1st, 1909, said Alabama Trust and Savings Company had deposited with this defendant a credit balance of Seventeen Thousand, Six Hundred and Fifty-five and 33/100 ($17,655.33) Dollars.

This defendant denies that it in any way induced or procured the officers of the Alabama Trust and Savings Company to abuse their said trust and confidential relations as exercised by them, to the advantage of this defendant or to the injury of the stockholders of said Trust Company and its creditors; and denies that it persuaded or induced the officers of said Trust Company to give to this defendant the notes of said Trust Company in the manner set out in complainant's amended bill of complaint, and denies that it entered into any plan, scheme or agreement with the makers of said notes to in any way injure or defraud said Alabama Trust and Savings Company, its stockholders or creditors.

This defendant avers that on or about May 1st, 1909, this defendant, having requested payment of said several notes, discounted for and endorsed by the Alabama Trust and Savings Company, upon the request of said Trust Company, accepted new notes of said Company, in the same amount as said original notes, each of which
52 notes was endorsed by the several makers of the said original notes.

This defendant denies that said Trust Company executed said notes purely for the accommodation of its said officers and stockholders, and denies that the execution of said notes was a part of any scheme or plan to defraud said Trust Company, its creditors or stockholders, or was of any advantage whatever to this defendant.

This defendant avers that said Alabama Trust and Savings Company was liable upon the original notes as endorser, and that said original notes were surrendered in consideration of the execution and delivery to this defendant of said notes executed by said Alabama Trust and Savings Company, and that the liability of said Alabama Trust and Savings Company was in no way increased or diminished by the execution of said notes, dated on or about May 1st, 1909.

This defendant denies that, as a part of any scheme or plan to defraud said Alabama Trust and Savings Company, it induced the officers of said Company to transfer or otherwise fraudulently give over to it as collateral security any notes, property or assets of said Company aggregating Eighty-four Thousand, Two Hundred ($84,200.00) Dollars, and consisting of notes, bonds, claims, demands and securities receivable of a value of Seventy-two Thousand, Five Hundred and Fifty-seven and 19-100 ($72,557.19) Dollars, or any other property or assets of said Trust Company, as set forth in said amended bill of complaint.

This defendant denies that it persuaded or induced the officers of the Alabama Trust and Savings Company to endorse or deliver to it any new notes or to transfer or give over to it any notes, bonds, claims,

demands or securities contrary to the duty of said officers of said Trust Company, for the purpose of obtaining apparently valid notes of said Savings Company to serve as an excuse or claim of right for the diversion or misapplication of any of said notes, bonds, claims, demands or securities, as alleged in said amended bill of complaint, or for the purpose of hindering or defrauding the creditors or stockholders of said Alabama Trust and Savings Company.

This defendant further denies that it has in its possession, in trust or otherwise, any of the assets of any kind or nature whatsoever belonging to said Alabama Trust *or* Savings Company, or the proceeds derived from any property or assets of said Alabama Trust and Savings Company.

53 This defendant further says that it has fully accounted to said Alabama Trust and Savings Company, its successors or privies in interest or contract, for all assets of every nature and kind heretofore received from it.

This defendant further says that after demanding payment of said notes executed by said Alabama Trust and Savings Company, this defendant did on or about June 11th, 1909, rightfully apply the sum of Seven Thousand, Two Hundred ($7,200.00) Dollars upon the note of the Alabama Trust and Savings Company, dated May 1st, 1909, for Ten Thousand ($10,000.00) Dollars, which note was endorsed by W. K. Smith, and did rightfully apply the sum of Ten Thousand, Four Hundred and Fifty-five and 33/100 ($10,455.33) Dollars upon the note of said Alabama Trust and Savings Company, dated May 1st, 1909, which note was endorsed by Gus T. Brannon; the money so applied being the amount of the credit balance The Alabama Trust and Savings Company had deposited with this defendant.

This defendant denies that said amount so applied is still the property or estate of said Alabama Trust and Savings Company, or that it is held by said defendant in trust or as trustee for the plaintiff in this cause.

This defendant denies that it had any knowledge or information, except as advised in plaintiff's amended bill of complaint, of any breach of trust or duty or malfeasance on the part of any of the officers of the Alabama Trust and Savings Company, in any of the transactions set forth in plaintiff's amended bill of complaint, and particularly as to any act or transaction with this defendant or any of its officers, agents or representatives.

Defendant denies that it collected large sums of money as the proceeds of any property or assets of said Alabama Trust and Savings Company, held by it as collateral, which it misapplied in any manner whatsoever, or which it holds in trust for the plaintiff in this cause of action, or for which it should be compelled in law or equity or good conscience to account for or pay over in any manner whatsoever to said Alabama Trust and Savings Company, its receiver or representatives.

This defendant denies that it collected or received in a fiduciary or quasi-fiduciary capacity sums aggregating more than Seventy-five Thousand ($75,000.00) Dollars. This defendant denies that it participated in any manner whatsoever, by or through its representatives

or officers, in fraudulently organizing a new bank under the general laws of the State of Alabama on or about December 25th,
54 1908, or that it concurred or participated, or in any manner gave its consent for the accomplishment of any such fraudulent purpose as set out in plaintiff's amended bill of complaint; and further denies any knowledge of the manner, means, or purpose of the organization of said City Bank and Trust Company, and denies that the same was organized with the active assistance or co-operation of this defendant, and denies it had anything whatever to do therewith.

This defendant further disclaims any participation in, consent to, or knowledge of the alleged fraudulent organization or incorporation of said City Bank and Trust Company, as set forth in the amended bill of complaint filed herein.

This defendant avers that it had no knowledge of the fact that said capital stock was not fully paid, as alleged in plaintiff's amended bill of complaint.

This defendant denies that, as a part of any scheme of fraudulent organization of said City Bank and Trust Company, it accepted the note of R. C. Head, Agent, for Seventy-five Thousand, Four Hundred ($75,400.00) Dollars, or participated in or had any knowledge of any fraud, malfeasance or breach of trust of any kind in the organization of said City Bank and Trust Company, and denies that it did any act or participated in any act whatsoever intended to misrepresent or conceal the true import and intent of said act or transaction.

This defendant avers that on or about December 29th, 1908, it loaned to R. C. Head, Agent, Ben T. Head and J. S. Head, Jr., upon their promissory note, the sum of Seventy-five Thousand, Four Hundred ($75,400.00) Dollars, and paid over and delivered to the makers of said note the full amount thereof.

This defendant avers that it made no attempt to direct or control the use or application of the proceeds of said note by the makers thereof and had no interest therein.

This defendant further says that it received a copy of a certain resolution, dated on or about January 4th, 1909, authorizing this defendant to charge the note of R. C. Head, Agent, to the account of the City Bank and Trust Company, at any time that it might appear to its interest to do so; that this defendant had no knowledge as to what consideration, if any, was paid by said makers of said note to said City Bank and Trust Company for the adoption of said resolution, or what consideration, if any, was given to said City Bank and Trust Company by the makers of said note for the passage of said resolution.

55 This defendant avers, however, that it took no action under the provisions of said resolution and charged no part of said note against the account of said City Bank and Trust Company.

Defendant further avers that it had no knowledge of the fact, if it was a fact, that said Ben T. Head, dominated and controlled the management and affairs of said City Bank and Trust Company, but presumed, and acted upon the presumption, that said Bank was controlled by its Directors, as provided by law.

Defendant denies that said City Bank and Trust Company was

insolvent from the time of its organization; and this defendant avers that it had no knowledge of the insolvency of said City Bank and Trust Company until on or about the time of the appointment of a receiver for said Bank; that until then it believed said Bank to be fully solvent and, acting upon such belief, loaned to said City Bank and Trust Company, large sums of money, subsequent to May 1st, 1909.

This defendant denies that by reason of the manipulation of its notes, bonds, claims and securities receivable by this defendant and by said Head and his said successors, said Alabama Trust and Savings Company became insolvent.

This defendant denies any participation in, consent to, or knowledge of any kind on its part of the sale or transfer of the assets of the Alabama Trust and Savings Company to the City Bank and Trust Company prior to the consummation thereof.

This defendant avers that on or about the time of said transfer it was advised by the officers of the Alabama Trust and Savings Company that the assets of said Company had been transferred to said City Bank and Trust Company, which had assumed all liabilities of said Alabama Trust and Savings Company in consideration of the transfer of said assets, and that said City Bank was the owner of all of the assets formerly owned by said Alabama Trust and Savings Company, and was liable for all the debts of the same.

This defendant further avers that it had no knowledge of any objection on the part of any stockholder or creditor of said Alabama Trust and Savings Company to said sale and transfer.

This defendant avers that it had no interest whatsoever in said sale and transfer and received no benefit of any kind therefrom, and further says that it supposed and believed, and still believes, that said transfer was a valid and legal transfer of the assets of said
56 Alabama Trust and Savings Company and that more than ninety per cent. of the stockholders legally consented to said transfer and sale.

This defendant further says that neither the creditors nor the stockholders of said Alabama Trust and Savings Company were in any way injured or defrauded by said sale, but on the contrary, all were benefitted thereby, and this defendant says that it believes and avers that said City Bank and Trust Company, in pursuance of said contract, paid and liquidated obligations of said Alabama Trust and Savings Company in an amount in excess of the value of all the assets and property received from said Alabama Trust and Savings Company.

This defendant further says that no objection was made by any creditor or stockholder or depositor of said Alabama Trust and Savings Company, or by the Receiver thereof, to said sale until more than thirteen months thereafter, although they had full knowledge and notice of said sale and transfer, and not until after both of said banks had been placed in the hands of a receiver, but on the contrary acquiesced in the same, with full knowledge that transactions were being constantly had on the faith of said transfer being valid in all respects; that by reason thereof the assets of said two banks became intermingled and it became impossible to separate the assets

one bank from the assets of the other, all without any fault on part of this defendant; that by reason of said acquiescence and ure to object, this defendant was confirmed in its belief that said e and transfer were valid and legal, and this defendant, acting on such belief, had, in due course of business, numerous transacns with said City Bank and Trust Company, in connection with ich this defendant paid out large sums of money and assumed ge liabilities, all to the knowledge of the stockholders, creditors l depositors of the Alabama Trust & Savings Company.

This defendant further says that long prior to the filing of this suit, wit: on December 29th, 1910, Edward D. Smith, Receiver of the arantee Bank & Trust Company, brought a certain suit, numbered 936, upon the docket of the Superior Court of the City of Cincinti (Southern District of Ohio, Western Division), against this dendant, for an accounting, temporary injunction and other relief; at said Edward D. Smith, as such Receiver, and being in full possion of all the books, records and papers and assets of the Guarantee Bank & Trust Company, formerly the City Bank and Trust Company, as well as those transferred by the Alabama Trust and Savings Company to the City Bank and Trust mpany, claimed and alleged in said suit that the said City Bank d Trust Company purchased and took over by contract, on or about e 27th day of September, 1909, all of the assets of the said Alama Trust and Savings Company and assumed all its liabilities in nsideration of the transfer of said assets; that said Edward D. ith, Receiver, further alleged the various dealings and transactions set out in plaintiff's amended bill of complaint, and asked for an counting upon the same, as the successor of said Alabama Trust d Savings Company, thereby treating said transfer and sale as in ery respect valid and binding; and alleged that on a proper statent of accounting and a proper settlement of all of said transactions, is defendant would be indebted to him as Receiver of said City nk and Trust Company, in a sum exceeding Thirty-seven Thoud, Seven Hundred ($37,700.00) Dollars, and praying further for injunction to prevent the sale of certain collateral held by this dendant, a part of which was the same collateral referred to and set up plaintiff's amended bill of complaint herein.

That such further proceedings were had in such action whereby d injunction was refused; that said action was prosecuted in error the Circuit Court of Hamilton County, Ohio, as appears in cause mbered 5283 of said Circuit Court of Hamilton County, Ohio, hich said Court affirmed the judgment of the Superior Court of ncinnati, and refused said injunction for the reason that the plainf in said suit had an adequate remedy at law.

That the plaintiff in said suit, not desiring to prosecute the same rther, secured the dismissal thereof in both of said Courts.

Defendant further alleges, on information and belief, that said suit the Superior Court of Cincinnati, Ohio, was brought and prosted as set forth with the full knowledge and acquiescence of the mplainant in this case.

Defendant avers that by reason of the laches and failure to object d take any action to prevent the full consummation of said sale

and transfer, the said Alabama Trust and Savings Company, its creditors, stockholders and receiver, are estopped from demanding the relief claimed in plaintiff's amended bill of complaint, if it should be found that said sale and transfer are, for any reason, void or voidable.

58 This defendant denies that at the time of said sale of the assets of the Alabama Trust and Savings Company to said City Bank and Trust Company both of said banks were insolvent and denies, that if they were, it had any knowledge or notice thereof.

This defendant further says that it has no knowledge of the facts set up in paragraphs seven and eight of plaintiff's amended bill of complaint except as contained therein, and the-efore demands strict proof of same.

This defendant admits that said City Bank did on or about September 27th, 1910, change its name to that of Guarantee Bank & Trust Company, without other change in its corporate capacity, but denies that on said date it was insolvent. This defendant further admits that on the fifth day of October, 1910, E. D. Smith was appointed receiver of said Guarantee Bank and Trust Company, in an action brought by Alexander M. Garber, as Attorney-General, against the Guarantee Bank and Trust Company, in the Chancery Court of Jefferson County, Alabama, and is now acting as such receiver.

For further defense, this defendant says that on or about the 25th day of September, 1909, said The Alabama Trust and Savings Company, of which complainant is receiver, by contract in writing, a copy of which is attached to said amended bill as an exhibit, did sell, assign, transfer and convey to the City Bank and Trust Company, the name of which was afterwards changed to The Guarantee Bank and Trust Company, all its assets and rights, credits and claims, of every kind, including those asserted in the said amended bill filed herein, and that said Guarantee Bank and Trust Company was subsequently placed in the hands of a receiver, namely, E. D. Smith, then and now a resident of, domiciled and having his place of abode in Birmingham, Jefferson County, Alabama, all as appears on the face of said amended bill of complaint herein; and that complainant has failed to make said City Bank and Trust Company, the Guarantee Bank and Trust Company or said E. D. Smith, as Receiver of said Guarantee Bank and Trust Company, parties to either the original or said amended bill of complaint, and this defendant suggests to the Court and respectfully insists that said City Bank and Trust Company, the Guarantee Bank and Trust Company and the said E. D. Smith as Receiver of the Guarantee Bank and Trust Company, are necessary and indispensable parties to this suit; and defendant craves the same benefit for this suggestion as if made by way of specific plea to the amended bill raising such point.

59 This defendant further says that, acting in good faith upon the belief that said City Bank and Trust Company was the valid and legal assignee of all of the assets of the Alabama Savings and Trust Company and that under said contract of sale, dated on or about the 25th day of September, 1909, said City Bank and Trust Company had assumed all of the obligations of said The Alabama Trust and Savings Company, it presented its duly verified claim,

numbered 1017, on the docket of the Chancery Court of Jefferson County, Alabama, in said proceeding, wherein said Alexander M. Garber was plaintiff, and the Guarantee Bank and Trust Company, was defendant; that said claim included various notes executed by the said City Bank and Trust Company, the Guarantee Bank and Trust Company and the Alabama Trust and Savings Company; that thereafter said E. D. Smith, as Receiver of the Guarantee Bank and Trust Company, filed, in such proceedings, a contest to said claim, and as ground for said contest set out as defense against said claims and as objections to the allowance thereof all and singular the facts set up in plaintiff's amended bill of complaint, the same being stated in substantially the same language as that contained in plaintiff's amended bill; that thereafter said E. D. Smith, as such receiver, filed a petition in said proceeding for leave to compromise all controversies with this defendant arising out of the various transactions set up and referred to in said objections to said claim of this defendant, including all of the claims, ques-ions and issues set forth in plaintiff's amended bill of complaint filed herein.

That thereafter the Chancery Court of Jefferson County, Alabama, entered a decree in said Court upon the petition of said Receiver, fully settling and adjudicating all questions, claims and issues alleged, made or charged in the amended bill of complaint filed herein; a duly certified copy of said proof of claim, the objections thereto, the petition for leave to compromise, and the decree of the Court is attached hereto and marked Exhibit "A," all of which proceedings were had and completed long prior to the filing of the original bill herein, and with full knowledge of the plaintiff herein; George Huddleston, Esquire, appearing of record as Solicitor for the Tuskegee Land and Security Company, one of the alleged creditors of said Alabama Trust and Savings Company and as attorney for W. C. Sterrett, Receiver for The Alabama Trust and Savings Company and E. H. Dryer, one of the attorneys for complainant in this
60 suit, appearing in person as amicus curiæ when said decree was entered in said court and consenting thereto, as set forth in said decree.

Wherefore, this defendant claims and alleges that all of the claims, demands and charges of the complainant herein have been fully adjudicated, settled and satisfied in a court of record and that complainant is fully bound and estopped by said prior adjudication.

Further answering, the defendant says that said complainant has not in and by said amended bill, made or stated such a cause as does or ought to entitle it to any such discovery or relief as is thereby sought and prayed for, from or against the defendant, it appearing by complainant's own showing by said amended bill that he is not entitled to the relief prayed for by the amended bill against this defendant.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith it is charged, without this, that amended bill of complaint to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed and avoided or denied is true to the knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to

aver and maintain and prove as this Honorable Court shall direct and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

J. B. FORAKER,
FERDINAND JELKE, JR.,
HIRAM D. PECK,
CHAS. M. LESLIE,
Solicitors for Defendant.

(Duly verified.)

Service of copy of this answer and the exhibits thereto is accepted on this 29th day of June, 1914.

PHILIP & S. C. ROETTINGER AND
E. H. DRYER,
Solicitors for Plaintiff,
Second National Bank of Cincinnati.

EXHIBIT "A."

$10,000.00.

CINCINNATI, O., May 4, 1910.

On demand after date, we promise to pay Second National Bank, or order, Ten Thousand Dollars for value received; payable at Second National Bank, with interest at 6 per cent. per annum, and I
61 hereby pledge as collateral security for the payment of this note, and all other obligations now owing, or which I may hereafter owe to said bank, transfer Gallilean Fisherman Mortgage note as colat.

In case of the market quotations of said collaterals declining, I hereby agree, upon request of the holder hereof, to either pledge additional collaterals or reduce the principal of this obligation by payment, so that the quoted market value of said collaterals shall at all times exceed the sum loaned thereon at least — per cent., and in default of which agreement, or of payment at maturity of this obligation, I hereby authorize and empower the holder hereof, at any time thereafter to sell at my expense all or any portion of said collaterals at any place in Cincinnati or elsewhere, at public or private sale, at holder's option, and with or without notice. In case of public sale, the holder hereof may purchase said collaterals or any part thereof, without liability beyond the net proceeds of such sale.

(Copy.)

CITY BK. & TRUST CO.,
By GEO. M. WEBB, *Pres.*

(Endorsed on back of note:) Interest paid to Aug. 1, 1910.

CINCINNATI, O., Sept. 22, 1910.

$4,000.

On demand after date, we promise to pay Second National Bank, or order, Four Thousand dollars, for value received; payable at Sec-

ond National Bank, with interest at 6 per cent., per annum, and we hereby pledged as collateral security for the payment of this note, and all other obligations now owing, or which we may hereafter owe to said bank General collat.

In case of the market quotations of said collaterals declining, I hereby agree, upon request of the holder hereof, to either pledge additional collaterals or reduce the principal of this obligation by payment, so that the quoted market value of said collaterals shall at all times exceed the sum loaned thereon at least — per cent., and in default of which agreement, or of payment at maturity of this obligation, I hereby authorize and empower the holder hereof, at any time thereafter to sell at my expsense, all or any portion of said collaterals at any place in Cincinnati or elsewhere, at public or private sale, at holder's option, and with or without notice. In case of public sale, the holder hereof may purchase said collaterals, or any part thereof, without liability beyond the net proceeds of such sale.

(Copy.)

GUARANTY BK. & TR. CO.,
By E. C. DUNN, *Cashier.*

62 (*Endorsed on Back of Note:*)

$519.12	Paid Oct. 6, 1910.
50.00	Paid, Nov. 14, 1910. C. K. Butler.
50.00,	Paid, Dec. 3, 1910. C. K. Butler.
600.00	Paid, Dec. 8, 1910. Kirkland.
75.36	Paid, Dec. 10, 1910. C. K. Butler.
50.00	Paid, Dec. 21, 1910. C. K. Butler.

$25,000. CINCINNATI, O., Dec. 22, 1909.

On demand after date, we promise to pay Second National Bank, or order, Twenty-five Thousand dollars, for value received; payable at Second National Bank, with interest at 6 per cent. per annum; and we hereby pledge as collateral security for the payment of this note, and all other obligations now owing, or which we may hereafter owe to said bank, notes general colat.

In case of the market quotations of said collaterals declining, I hereby agree, upon request of the holder hereof, to either pledge additional collaterals or reduce the principal of this obligation by payment, so that the quoted market value of said collaterals shall at all times exceed the sum loaned thereon at least — per cent., and in default of which agreement, or of payment at maturity of this obligation, I hereby authorize and empower the holder hereof, at any time thereafter to sell at my expense, all or any portion of said collaterals at any place in Cincinnati or elsewhere, at public or private sale, at holder's option, and with or without notice. In case of public sale, the holder hereof may purchase said collaterals or any part thereof, without liability beyond the net proceeds of such sale.

(Copy.)

CITY BANK & TRUST CO.,
By GEO. M. WEBB, *Pres.*

(*Endorsed on Back of Note:*)

$155.20	Paid, Jan. 8, 1910.
300.00	Paid, Jan. 31, 1910.
500.00	Paid, Mch. 10, 1910.
125.00	Paid, Mch. 10, 1910.
5,919.00	Paid, Mch. 22, 1910.
600.00	Paid, June 3, 1910.
58.50	Paid, June 8, 1910.
500.00	Paid, June 29, 1910.
1,000.00	Paid, July 25, 1910.
1,000.00	Paid, July 25, 1910.
500.00	Paid, July 29, 1910.
100.00	Paid, Dec. 18, 1909.
500.00	Paid, Jan. 31, 1910.
500.00	Paid, Aug. 4, 1910.
63 1,000.00	Paid, Aug. 12, 1910.
300.00	Paid, Aug. 26, 1910.
500.00	Paid, Sept. 29, 1910.
$13,558.50.	

(Interest paid to Aug. 1, 1910.)

$15.00	Paid, Jan. 4, 1911. Sale Collateral, C. H. Butler.
500.00	P. Jan. 4, 1911. Jamestown Mfg. Co. note.
250.00	Same.
250.00	Same.
500.00	Same.
500.00	Same.
270.00	Pd. W. S. Herron note.
770.00	Pratt City Bk. stock.
60.00	Friel note.
100.00	B. T. Head note.
100.00	Queenstown Hotel & Imp. Co. note.
100.00	M. R. McNeil note.
330.00	M. R. McNeil note.
200.00	Hinds Peevy note.

Above credits from sale of collateral made Dec. 30, 1910.

BIRMINGHAM, ALA., 9-27-1910.

$13,000.00.

On demand, without grace, we promise to pay to the order of Second Nat'l Bank, the sum of Thirteen Thousand Dollars, with 5% int. from date, payable at Guarantee Bank & Trust Company, Birmingham, Ala., General coll. held.

The parties to this instrument, whether maker, endorsers, surety, or guarantor, each for himself, hereby severally waive as to this debt or any renewal thereof, all right of exemption under the Constitution and Laws of Alabama, as to personal property, and they each severally agree to pay all costs of collecting or securing, or attempting to

collect or secure this note, severally waive demand, presentment protest, notice of protest, suit, and all other requirements necessary to hold them, and they agree that time of payment may be extended without notice to them of such extension. The bank at which this note is payable is hereby authorized to apply, on and after maturity, to the payment of this debt, any funds in said bank belonging to the maker, surety, endorser, guarantor or any one of them.

GUARANTEE BANK & TR. CO.,
E. C. DUNN, *Cashier,*
Birmingham, Ala.

61 (Copy.)

(Endorsed on back of note:) $250.00 Paid Jan. 4, 1911. 250 sh. West & Atl. Ins. Co. stock. (Sale of collateral of Dec. 20, 1910.)

BIRMINGHAM, ALA., Apr. 4, 1910.

$10,000.

On d-mand after date, for value received, we promise to pay to the order of Second National Bank of Cincinnati, Ohio, in the United States Gold coin of present standard of weight and fineness, at the office of the City Bank & Trust Company, Ten Thousand Dollars, having deposited as collateral security for the payment of this note or any other liability or liabilities of the undersigned to the owner of this note, due or that may become due, existing or may hereafter be contracted, the following property, viz: Certain collateral as per list attached, with full power and authority to sell, assign and deliver the whole or any part thereof, or any substitute therefor, or any addition thereto, at any broker's board at public or private sale, at the option of the owner or holder of this note, his, their or its assigns, on the non-performance of this promise, on non-payment of any of the liabilities above named, at any time or times thereafter, without advertising or notice, which is hereby expressly waived, and upon such sale the owner or holder hereof may purchase the whole or any part of said securities discharged from any right of redemption or liability for conversion. In case of depreciation in the market value of the security hereby pledged, or may hereafter be pledged for the payment of this note, or if from any cause whatever the said securities pledged shall cease to be satisfactory collateral to the owner or holder hereof for this debt, its renewal or substitute, the undersigned hereby agrees to deposit additional security from time to time as demanded, and failing to deposit additional security to the satisfaction of the owner or holder hereof, this note shall become due and payable for all purposes, and a sale of collateral pledged made be made immediately as provided for above, and after deducting all costs and expenses of such sale, including commission, to apply the residue of the proceeds to the payment of this note or any other liability or liabilities of the undersigned to the owner or holder of this note. The surplus, if any, to be paid to the undersigned.

Each and every maker and endorser of this note hereby waives all

right of exemption of property from levy and sale under exe-
65 cution or other process for the collection of debts, as porvided for in the Constitution and laws of the State of Alabama, or any other State of the United States of America, and it is hereby agreed by each maker and endorser hereof, that they shall pay all costs of collecting this note, after failure to pay when same becomes due under the terms hereof, including a reasonable attorney's fee for all services rendered in any way, in any suit against any maker or endorser, or in collecting or attempting to collect, or in securing or attempting to secure this debt. Each and every maker and endorser of this note hereby waives demand, protest and notice of protest, and all requirements necessary to hold them as makers and endorsers.

CITY BANK & TRUST CO.,
By GEO. M. WEBB, *Pres't.*

(Copy.)

Endorsement on back:
Interest paid May 1st, 1910.
Interest paid Aug. 1st, 1910. 2
$2,000.00 paid Jan. 4, 1911. Coop. Agcy. stock.

BIRMINGHAM, ALA., May 1, 1909.

$5,000.00.

On demand after date without grace, we promise to pay to the order of ourselves, Five Thousand Dollars, for value received, in gold coin of the United States of the present standard of weight and fineness, with interest from date until paid.

Payable at the Alabama Trust & Savings Company, in Birmingham, Alabama.

The parties to this instrument, whether maker, endorser, surety or guarantor, each for himself, hereby severally waive as to this debt, or any reneval thereof, all right of exemption under the Constitution and Laws of Alabama, as to personal property, and they each severally agree to pay all costs of collecting or securing, or attempting to collect or secure this note, including a reasonable attorney's fee, whether the same be collected by suit or otherwise. And the maker, endorser, surety or guarantor of this note severally waives demand, presentment, protest, notice of protest, suit and all other requirements necessary to hold them, and they agree that time of payment may be extended without notice to them of such extension. The Bank at which this note is payable is hereby authorized to apply on or after maturity, to the payment of this debt, any funds in said bank belonging to the maker, endorser, guarantor or any one of them.

ALA. TRUST & SAV. CO.,
By GUS. T. BRANNON, *Pres.*

66 Endorsed: Ala. Trust & Sav. Co. by Gus T. Brannon. Jas. R. Lewis. $5 paid Jan. 4, 1911.

BIRMINGHAM, ALA., May 1, 1909.

$15,000.

On demand after date, without grace, we promise to pay to the order of ourselves, Fifteen Thousand Dollars, for value received, in gold coin of the United States of the present standard of weight and fineness with interest from date until paid. Payable at the Alabama Trust & Savings Company, in Birmingham, Alabama.

The parties to this instrument, whether maker, endorser, surety or guarantor, each for himself, hereby severally waive as to this debt, or any renewal thereof, all right of exemption under the Constitution and Laws of Alabama, as to personal property and they each severally agree to pay all costs of collecting or securing, or attempting to collect or secure this note, including a reasonable attorney's fee, whether the same be collected by suit or otherwise. And the maker, endorser, surety or guarantor of this note severally waives demand, presentment, protest, notice of protest, suit and all other requirements necessary to hold them, and they agree that time of payment may be extended without notice to them of such extension. The bank at which this note is payable is hereby authorized to apply on or after maturity, to the payment of this debt, any funds in said bank belonging to the maker, surety, endorser, guarantor or any one of them.

ALA. TRUST & SAV. CO.,
By GUS T. BRANNON, *Pres.*

Endorsed: Ala. Tr. & Sav. Bk. by Gus. T. Brannon, Pres. Enos R. Stewart.

BIRMINGHAM, ALA., May 1, 1909.

$15,000.

On demand after date, without grace, we promise to pay to the order of ourselves, Fifteen Thousand Dollars, for value received, in gold coin of the United States of the present standard of weight and fineness with interest from date until paid. Payable at the Alabama Trust & Savings Company, in Birmingham, Alabama.

67 The parties to this instrument, whether maker, endorser, surety or guarantor, each for himself, hereby severally waive as to this debt, or any renewal thereof, all right of exemption under the Constitution and Laws of Alabama, as to personal property and they each severally agree to pay all costs of collecting or securing, or attempting to collect or secure this note, including a reasonable attorney's fee, whether the same be collected by suit or otherwise. And the maker, endorser, surety or guarantor of this note severally waives demand, presentment, protest, notice of protest, suit and all other requirements necessary to hold them, and they agree that time of payment may be extended without notice to them of such extension. The bank at which this note is payable is hereby authorized to apply on or after maturity, to the payment of this debt, any funds in said bank belonging to the maker, surety, endorser, guarantor or any one of them.

ALA. TRUST & SAV. CO.,
By GUS T. BRANNON, *Pres.*

Endorsed: Ala. Trust & Sav. Co. by Gus. T. Brannon, Pres. Gus. T. Brannon.

$10,000	Paid June 11, '09.
55.33	Paid July 9, '09.
300.00	Paid Aug. 3, '09.
100.00	Paid Aug. 30, '09.
12.90	Paid Jan. 4, 1911.

BIRMINGHAM, ALA., May 1, 1909.

$14,200.

On demand after date, without grace, we promise to pay to the order of ourselves, Fourteen Thousand, Two Hundred Dollars, for value received, in gold coin of the United States of the present standard of weight and fineness, with interest from date until paid. Payable at the Alabama Trust & Savings Company, in Birmingham, Alabama.

The parties to this instrument, whether maker, endorser, surety or guarantor, each for himself, hereby severally waive as to this debt, or any renewal thereof, all right of exemption under the Constitution and Laws of Alabama, as to personal property and they each severally agree to pay all costs of collecting or securing, or attempting to collect or secure this note, including a reasonable attorney's fee, whether the same be collected by suit or otherwise. And the maker, endorser, surety or guarantor of this note severally waives
68 demand, presentment, protest, notice of protest, suit and all other requirements necessary to hold them, and they agree that time of payment may be extended without notice to them of such extension. The bank at which this note is payable is hereby authorized to apply on or after maturity, to the payment of this debt, any funds in said bank belonging to the maker, surety, endorser, guarantor or any one of them.

ALA. TRUST & SAVINGS CO.,
By GUS T. BRANNON, *Pres.*

Endorsement: Ala. Trust & Savings Co. by Gus T. Brannon, Pres. Interstate Securities Co. by Gus. T. Brannon, Pres. $24.20 paid Jan. 4, 1911.

BIRMINGHAM, ALA., May 1, 1909.

$10,000.

On demand after date, without grace, we promise to pay to the order of ourselves, Ten Thousand Dollars for value received, in gold coin of the United States of the present standard of weight and fineness, with interest from date until paid. Payable at the Alabama Trust & Savings Company, in Birmingham, Alabama.

The parties to this instrument, whether maker, endorser, surety or guarantor, each for himself, hereby severally waive as to this debt, or any renewal thereof, all right of exemption under the Constitution and Laws of Alabama, as to personal property and they each severally agree to pay all costs of collecting or securing, or attempting to collect or secure this note, including a reasonable attorney's fee,

whether the same be collected by suit or otherwise. And the maker, endorser, surety or guarantor of this note severally waives demand, presentment, protest, notice of protest, suit and all other requirements necessary to hold them, and they agree that time of payment may be extended without notice to them of such extension. The bank at which this note is payable is hereby authorized to apply on or after maturity, to the payment of this debt, any funds in said bank belonging to the maker, surety, endorser, guarantor or any one of them.

ALA. TRUST & SAV. CO.,
By GUS T. BRANNON, *Pres.*

Endorsed: Ala. Tr. & Sav. Co. by Gus T. Brannon, Pres. W. K. Smith.

$7,200 Paid June 11, 1909.
10 Paid Jan. 4, 1911.

BIRMINGHAM, ALA., May 1, 1909.

69 $10,000.

On demand after date, without grace, we promise to pay to the order of ourselves, Ten Thousand Dollars, for value received, in gold coin of the United States of the present standard of weight and fineness, with interest from date until paid. Payable at the Alabama Trust & Savings Company, in Birmingham, Alabama.

The parties to this instrument, whether maker, endorser, surety or guarantor, each for himself, hereby severally waive as to this debt, or any renewal thereof, all right of exemption under the Constitution and Laws of Alabama, as to personal property and they each severally agree to pay all costs of collecting or securing, or attempting to collect or secure this note, including a reasonable attorney's fee, whether the same be collected by suit or otherwise. And the maker, endorser, surety or guarantor of this note severally waives demand, presentment, protest, notice of protest, suit and all other requirements necessary to hold them, and they agree that time of payment may be extended without notice to them of such extension. The bank at which this note is payable is hereby authorized to apply on or after maturity, to the payment of this debt, any funds in said bank belonging to the maker, surety, endorser, guarantor or any one of them.

ALA. TRUST & SAV. CO.,
By GUS T. BRANNON, *Pres.*

Endorsed by Ala. Tr. & Sav. Co., by Gus T. Brannon, Pres. Tom Stobart.

BIRMINGHAM, ALA., May 1, 1909.

$15,000.

On demand after date, without grace, we promise to pay to the order of ourselves, Fifteen Thousand Dollars, for value received, in gold coin of the United States of the present standard of weight and fineness with interest from date until paid. Payable at the Alabama Trust & Savings Company, in Birmingham, Alabama.

The parties to this instrument, whether maker, endorser, surety or guarantor, each for himself, hereby severally waive as to this debt, or any renewal thereof, all right of exemption under the Constitution and Laws of Alabama, as to personal property and they each severally agree to pay all costs of collecting or securing, or attempting
70 to collect or secure this note, including a reasonable attorney's fee, whether the same be collected by suit or otherwise. And the maker, endorser, surety or guarantor of this note severally waives demand, presentment, protest, notice of protest, suit and all other requirements necessary to hold them, and they agree that time of payment may be extended without notice to them of such extension. The bank at which this note is payable is hereby authorized to apply on or after maturity, to the payment of this debt, any funds in said bank belonging to the maker, surety, endorser, guarantor or any one of them.

ALA. TRUST & SAV. CO.,
By GUS T. BRANNON, *Pres.*

Endorsed: Ala. Trust & Sav. Co. by Gus T. Brannon, Pres. Ector H. Smith.

$15 paid Jan. 4, 1911.

To balance due on note for $25,000.00, dated Dec. 22, 1909	$7,496.50
To balance due on note for $4,000.00, dated Sep. 22, 1910.	2,655.52
To amount due on note for $10,000.00, dated May 4, 1910	10,000.00
To balance due on note for $13,000.00, dated Sept. 27, 1910	12,750.00
To balance due on note for $10,000.00, dated Apr. 4, 1910	8,000.00
To amount due on notes of Alabama Trust & Savings Co., under contract dated March 22, 1910	16,477.57
	$57,379.59

With interest as provided in said several notes, copies of which are attached.

(Copy.)

This agreement entered into this 22nd day of March, 1910, by and between The Second National Bank of Cincinnati, Ohio, and the City Bank & Trust Company of Birmingham, Alabama, Witnesseth:

That Whereas, the said, The Second National Bank of Cincinnati, Ohio, holds seven (7) notes executed by the Alabama Trust & Savings Company, endorsed by several endorsers, aggregating $84,200.00, upon which there remains a balance due of $66,544.07, and

Whereas said The Second National Bank of Cincinnati, Ohio, claims that the City Bank & Trust Company is liable to it for the payment of said notes, and
71 Whereas said, The City Bank & Trust Company have questioned its liability for the payment thereof;

Therefore, in consideration of the mutual agreement hereinafter contained on behalf of said The City Bank & Trust Company, the Second National Bank of Cincinnati, Ohio, does hereby release said, The City Bank & Trust Company from any liability for the payment of $50,000.00 of the amount due upon said notes.

In consideration whereof, said The City Bank & Trust Company does hereby guarantee the payment of said notes to the extent of $16,544.67, said sum to be paid by said Bank in addition to any amount collected from the makers or endorsers, provided however, that if said The Second National Bank shall collect from the maker and endorsers of said notes a sum exceeding $50,000.00, then such surplus shall be returned to the City Bank & Trust Company. Said the City Bank & Trust Company further releases said The Second National Bank from any liability on account of any payments heretofore made upon said notes.

In consideration whereof, the parties hereto have caused their corporate names to be subscribed by their respective officers thereunto duly authorized.

THE CITY BANK & TRUST CO.,
By C. H. SEALS,
Vice-President.

THE SECOND NATIONAL BANK,
By G. W. WILLIAMS, *Cashier.*

In the Chancery Court of Jefferson County, Ala.

No. 5733.

ALEX. M. GARBER, as Attorney-General, Complainant,

versus

GUARANTEE BANK & TRUST COMPANY.

In said cause comes the Second National Bank of Cincinnati, O., petitioner, and under the decree of the Court, rendered therein on the — 1910, intervenes and propounds its claim and demand as therein provided and shows and represents to the Court as follows, to-wit: Said Guarantee Bank & Trust Company is indebted to petitioner in the net balance of Fifty-seven Thousand, Three Hundred and Seventy-nine 59/100 dollars, with interest, after allowing all just payments, credits, demands, offsets and recoupments, an itemized verified statement of which claim of petitioner, showing both debits and credits is hereto attached and made a part hereof; that said claim of petitioner is secured only as follows:

72 Collateral as follows: In hands of Receiver; sent to Bank for collection and remittance before Receiver appointed:
Note, A. R. Dearborn, $1,000.00. Mortgage attached.
Note, S. P. King, $2,000.00.
Algood & Friel, $1,000.00; deed attached.
T. H. Friel, $300.00.

J. E. Ellis, $1,000.00; stock attached.
Ebersole, $1,000.00.
Gallilean Fishermen property as per copy of contract attached.

That no part of said claim of petitioner, nor of any of said items in said statement, consist of any claim, demand or liability of said Guarantee Bank & Trust Company, which was transferred to or in any manner acquired by petitioner directly or indirectly, after said Guarantee Bank & Trust Company ceased to do its regular banking business, but arose altogether in due and regular course of business between petitioner and said bank while said regular banking business was carried on by said bank.

Wherefore, petitioner propounds said claim and security therefor as hereinabove set out, and prays that the same be allowed and decreed in favor of petitioner in this suit; and that in the marshalling and administering of the assets of said Guarantee Bank & Trust Company, when the said property constituting said security is sold by this Court in this proceeding, the proceeds stand in lieu thereof, impressed with petitioner's said lien and charge thereon.

THE SECOND NAT. BANK OF CINCINNATI, O.,
Petitioner,
By G. W. WILLIAMS,
Cashier.

THE STATE OF OHIO,
County of Hamilton:

Before me, Chas. M. Leslie, a Notary Public in and for said County in said State, this day personally appeared Geo. W. Williams, Cashier of The Second National Bank of Cincinnati, O., who having first been duly sworn, on oath doth depose and say that he has personal knowledge of the facts set out and alleged in the foregoing petition, and that the allegations of facts therein contained are true as therein alleged.

Sworn to and subscribed before me, on this the 4th day of January, 1911.

[SEAL.] CHAS. M. LESLIE,
Notary Public.

On the foregoing is endorsed: Filed in office Jan. 10, 1911. J. W. Altman, Register in Chancery.

73 In Chancery Court of Jefferson County, Ala.

In re Claim No. 1017 of SECOND NATIONAL BANK OF CINCINNATI, OHIO, for $57,379.59.

ALEX. M. GARBER, as Attorney-General, Complainant,

vs.

GUARANTEE BANK & TRUST COMPANY, Respondent.

Now comes E. D. Smith, heretofore appointed and qualified as Receiver of the Guarantee Bank & Trust Company in the above entitled cause and denies that claim No. 1017 of the Second National Bank of Cincinnati, Ohio, for $57,379.59, filed in this Court in this cause on to-wit: January 10, 1911, is correct and true or valid, and files a contest to said claim and as grounds for contest assigns the following:

1. The Alabama Trust & Savings Company, hereinafter called the Alabama Trust, was a corporation, incorporated and organized under the laws of the State of Alabama, authorized to do a general banking business, and was engaged in such business in the City of Birmingham, Alabama, prior and up to September 27th, 1909; that on to-wit: December 29th, 1908, the City Bank & Trust Company, hereinafter called the City Bank, was incorporated and organized under the laws of Alabama and authorized to do a general banking business; that on to-wit: September 27th, 1909, said City Bank took charge of the assets of said Alabama Trust under a written proposition purported to be made by it to the Alabama Trust and purported to be accepted by the Alabama Trust, whereby under some sort of conditions, too briefly set forth to be clear and definite, the City Bank was to assume and discharge the liabilities of the Alabama Trust; that on to-wit: 23rd day of May, 1910, the name of said City Bank was changed to that of Guarantee Bank & Trust Company, being the same bank herein designated as the Guarantee Bank, and the same whereof this contestant was appointed Receiver as aforesaid.

2. The contestant E. D. Smith, Receiver as aforesaid, is informed and believes, and upon such information and belief avers, that on or about September 30th, 1908, one Ben T. Head purchased or agreed to purchase all of the stock of Alabama Trust, consisting of one thousand (1,000) shares of the par value of One Hundred Thousand ($100,000.00) Dollars, and negotiated or manipulated a transaction with the Second National Bank of Cincinnati, Ohio, hereinafter called Second National Bank, wherein a loan or credit of $100,000.00 was secured from the said Second National Bank, for which the said Head gave or agreed to give his personal note; that with this
74 credit so secured from the said Bank, as the initial transaction, the said Head assumed control of the Alabama Trust, and numerous and various transactions thereafter occurred from time to time between said Head and said Second National Bank. Contestant is informed and believes, and upon such information and belief alleges, that shortly thereafter, about two weeks, the said Head disposed of the 1,000 shares of capital stock of the Alabama Trust in

a transaction negotiated with one G. T. Brannon, Ector H. Smith and others; that as a result of this transaction, seven notes were executed and given to the Second National Bank amounting in the total to $84,200.00 as follows:

One Gus T. Brannon executed his note for $15,000.00.
Ector H. Smith executed his note for $15,000.00.
Enos R. Stewart executed his note for $15,000.00.
Tom Stobert executed his note for $10,000.00.
W. K. Smith executed his note for $10,000.00.
Interstate Securities Company executed its note for $14,200.00.
And J. R. Lewis executed his note for $5,000.00.

Contestant is not informed as to what disposition was made of the note executed or agreed to be executed by the said Ben T. Head to Second National Bank for $100,000.00, and is not informed as to how the transfer of the capital stock of the Alabama Trust was made from the owner or owners of the stock from whom said Head bought, or to whom new certificates of stock of the Alabama Trust were issued; that contestant has made diligent search for both the stock book or certificate book of the Alabama Trust, but is unable to find or locate either of said books, and makes demand upon the claimant, Second National Bank, to produce before this Court in this cause all documents, records and memoranda of every kind and description, including all of the said described notes, and all certificates of capital stock of the Alabama Trust in its possession or under its control, relating in any manner to the purchase of the capital stock of the Alabama Trust, or concerning in any way the claim or any part thereof here contested.

3. Contestant is informed and believes, and upon such information and belief avers that at the time, to-wit: September 30th, 1908, and to-wit: October 17th, 1908, when the said Ben T. Head acquired the capital stock of the Alabama Trust, and in turn immediately disposed of the same to the said G. T. Brannon and the said Ector H. Smith and others named above, the said Second National Bank, having transacted as aforesaid with the said Ben T. Head and
75 with the said G. T. Brannon and the said Ector H. Smith and others above named, became fully informed of the amount and character of the deposits, loans, discounts, debit and credit accounts of the banking business of the Alabama Trust, and that during the period from to-wit: October 1st, 1908, to May 1st, 1909, the Alabama Trust loaned, recklessly and with insufficient security, large sums of money to the said G. T. Brannon, the said Ector H. Smith and the said W. K. Smith, the said Interstate Securities Company, and the said Enos R. Stewart, and to the firm of Brannon & Smith, composed of the said G. T. Brannon and said Ector H. Smith, and to the Brannon Lumber Company, C. H. Rowden and to Ben T. Head, aggregating to-wit: the sum of $57,380.00. Contestant further says that the Alabama Trust during the said period from to-wit: October 1st, 1908, to May 1st, 1909, had numerous and sundry dealings with the claimant, the Second National Bank, consisting of loans, discounts and debit and credit accounts, involving many transactions and that said dealings and acts were continuous to September 27th, 1909, the date at which the said City Bank became possessed of the

estate of the said Alabama Trust and undertook and assumed, in the manner heretofore shown, its liabilities, and that the said City Bank and also the said Guarantee Bank continued a similar line of dealings and of numerous transactions with said Second National Bank.

4. Contestant is informed and believes, and upon such information and belief says, that on to-wit: May 1st, 1909, following the reckless management of the Alabama Trust, carried on by its officers as hereinabove shown, one E. E. Galbreath, Vice-President of said Second National Bank, came to Birmingham and by the application and employment of the influence of the said Second National Bank with the President and other officers of the Alabama Trust, obtained and secured the co-operation and collusion of the management of said Alabama Trust and changed and shifted with the active aid, collusion and consent of G. T. Brannon, at that time President of the Alabama Trust, the above described indebtedness of $84,200.00 due the said Second National Bank represented by the seven above described notes executed and given to said Second National Bank, from an individual indebtedness of said makers of said notes to an alleged indebtedness of the Alabama Trust, by inducing and requiring the said Brannon to execute on to-wit: May 1st, 1909, seven different notes in the name of the Alabama Trust
70 & Savings Company as maker, by him as President, payable to the order of "Ourselves," and each of said seven notes were likewise endorsed by the Alabama Trust & Savings Company, by G. T. Brannon, President, and also respectively endorsed by the said persons shown as makers of the original notes executed to the said Second National Bank, the said original makers endorsing respectively the notes thus made and executed by the Alabama Trust each for the amount of his indebtedness to the Second National Bank, as shown by his original note to said Bank; and said notes of the Alabama Trust were then substituted with the said Second National Bank for the seven original notes given to the said Second National Bank for the said sum of $84,200.00 by the said parties on their own account and responsibility, and that said Second National Bank was informed that the said sums so negotiated by them as loans to said original makers were for the purchase of the capital stock of the Alabama Trust, and that shares of said stock were to be issued to said parties on the basis of the respective indebtedness so shown to the Second National Bank by the said parties.

Contestant further avers upon information and belief, that the execution of the said notes of the Alabama Trust by the said G. T. Brannon as President, for the said amounts and the substitution of them with the said Second National Bank in lieu and in settlement of the individual indebtedness of the said seven parties, due and payable by said parties to the said Second National Bank, was unauthorized and illegal and constituted a fraud upon the said Alabama Trust and its depositors, and that such execution and substitution of said notes was done without the authority of the Board of Directors of the Alabama Trust by the said G. T. Brannon, that the said Board of Directors refused or failed to give such authority for the execution of the Bank's notes for the indebtedness of the said parties, and contestant further avers that had such authority been given to the said Brannon

as President, by the Board of Directors of said Alabama Trust, the transaction would have been invalid and equally tainted with fraud upon the rights of the bank and its depositors; that on or about June 5th, 1909, after the return of the said E. E. Galbreath, Vice-President, from Birmingham to Cincinnati, the Alabama Trust received notice that the said indebtedness of $84,200.00 had been credited to the account of the Alabama Trust by the said Second National Bank, and at the same time, the account of the Alabama Trust had been charged with the said several amounts of the said different and separate notes of the said Brannon, the said Smith and the said
77 other parties, aggregating the sum of $84,200.00, the result being merely a cross entry of said sum on the debit and credit account of the said Alabama Trust on the books of the Second National Bank and effecting the evident plan of the said Second National Bank and its said associates with whom it was dealing and transacting business in Birmingham, Alabama, to shift the said indebtedness of $84,200.00 and the primary liability for the payment thereof, from the said individuals and the said Interstate Securities Company, to the said Alabama Trust; that the manner in which the said cross charge and credit of the said indebtedness of $84,200.00 was made is shown on the statement of the account rendered by the Second National Bank for June, 1909, to the said Alabama Trust, that after running the said amount of $84,200.00 as a debit and a credit through the books of the said Second National Bank, as aforesaid, the said Second National Bank arbitrarily and without the consent of the Alabama Trust, and illegally on to-wit: June 11th, 1909, appropriated the sum of $17,200, money due the said Alabama Trust and at the time in the hands of the said Second National Bank, and credited it as follows: $10,000.00 on the above described note of the Alabama Trust dated May 1st, 1909, for $15,000.00, payable to the order of "Ourselves," and endorsed by the said Gus T. Brannon (the said note being one of the notes herein averred to be fraudulent and void and constituting one of the substituted notes of the Alabama Trust for the individual indebtedness of the said Gus T. Brannon) and $7,200.00 on the said described demand note of the Alabama Trust, dated May 1st, 1909, payable to the order of "Ourselves" and endorsed by W. K. Smith (the said note being also one of the substituted notes of the Alabama Trust, averred to be fraudulent and void for the reasons aforesaid), and complainant avers that such diversion and application of the said sum of $17,200.00 of the funds of the Alabama Trust on deposit with the said Second National Bank was unauthorized, illegal and constituted a fraud upon the said Alabama Trust and its depositors; that it appears by the endorsements of the differences made and carried by the Alabama Trust on the monthly statements rendered the Alabama Trust by the Second National Bank that the said sum of $17,200.00 was not credited by the Alabama Trust to the said Second National Bank, and that the Alabama Trust made no entries on its books of the amount, and did not consent to such appropriation, but on the other hand, carried it continu-
78 ously as a difference until the Alabama Trust was absorbed by the said City Bank & Trust Company, September, 1909, in the manner herein shown, when it appears that the said credit of $17,200.00 in favor of the said Alabama Trust, was lost sight of by a

process or plan alleged by this contestant to have been improper, illegal, unauthorized and in a manner constituting a fraud upon the said Alabama Trust and its depositors.

Contestant further alleges that the books, accounts and papers of the said Alabama Trust do not show that it made any notes, bills payable, or any other evidence of indebtedness to the Second National Bank on which the name of either G. T. Brannon or the said W. K. Smith appeared, and that so far as the books, accounts and papers of the Alabama Trust are concerned or show, the said Second National Bank had no authority whatever to charge said sum of $10,000.00, and said sum of $7,200.00 in the manner aforesaid against the Alabama Trust, and that said two sums, to-wit: the sum of $17,200.00, as far as the books, papers and accounts of the Alabama Trust show, is still due it; and that the notes on which the said two sums of $10,000.00 and $7,200.00 respectively, are credited, are invalid obligations of the said Alabama Trust and the said Second National Bank owes the amount of $17,200.00 and interest thereon from June 11, 1909, to the Guarantee Bank & Trust Company or its Receiver.

In this connection, contestant further avers upon information and belief, that the cash account of the Alabama Trust, at the time when the said Alabama Trust was acquired by the said Ben T. Head of the former owners of the stock thereof, amounted to the sum of to-wit: $152,000.00; that pursuant to an agreement between said Alabama Trust and said Second National Bank, said agreement forming a part and being one of the essential ingredients of contract between the said parties, on to-wit: October 3rd, 1908, $133,000.00 of the said cash account of $152,000.00 of said Alabama Trust, was sent and transferred to the said Second National Bank in Cincinnati, and that contemporaneously with this transfer or about the same time, the said Ben T. Head delivered a check or draft to the said owner or owners of the capital stock of said Alabama Trust, on the said Second National Bank for $100,000.00, in payment of the capital stock of the Alabama Trust purchased by the said Head from the said owner or owners as aforesaid, and that the said Second National Bank knew and was informed that the capital stock of the Alabama Trust so purchased by the said Ben T. Head was to be paid for by him by a check or draft on said Second National Bank, all of which is proof of an understanding and agreement between said Ben T. Head and associates or successors and Second National Bank, that the Alabama Trust was to keep or carry of its deposits and assets to its credit with said Second National Bank an amount equal to the amount due the Second National Bank by said Head and associates or successors, which understanding or agreement contestant on information and belief states was entered into and did exist.

3. The contestant, said E. D. Smith, Receiver, is informed and believes, and upon such information and belief avers that many notes which came into the hands of the said Second National Bank as collateral in its dealings with the said Alabama Trust, were collected by said Second National Bank and wrongfully and improperly applied to the payment of the $84,200 debt or fund heretofore described, and for the purpose of fairly adjusting the claim of the said Second

National Bank, contestant makes a demand upon the claimant herein to produce an itemized statement and list showing how each collection was applied or credited, describing fully all collateral notes and papers turned over in the course of business by the Alabama Trust to it; and contestant further avers and alleges that it is shown upon the books of the Alabama Trust and the statements of the Second National Bank made by it to the Alabama Trust and also to the City Bank & Trust Company, that a very large amount of interest has been charged by the said Second National Bank on account of notes or papers of the Alabama Trust, and that so far the said Second National Bank has failed or refused to furnish a statement showing how much of such various interest items have accrued on the above described $84,200.00 debt, and contestant avers that it is impossible to separate such interest charges and apply them properly, except by an accounting and for that purpose and that such interest charges may be fairly adjusted, claimant makes a demand upon the said Second National Bank to produce before the Register of this Court, all books, documents, records and memoranda of every kind and description in its possession or under its control, in any way relating to such various interest charges made by it from time to time against either the Alabama Trust or the City Bank & Trust Company.

6. Contestant further alleges and avers that the last item of the claim of the said Second National Bank filed in this cause, is
80 listed as follows: "To amount due on notes of Alabama Trust & Savings Company under contract dated March 22, 1910, $16,477.57"; that the said contract referred to was an agreement signed by C. H. Seals, Vice-President for the City Bank & Trust Company, and by G. W. Williams, Cashier of the said Second National Bank, that said agreement or contract deals with and is based upon the above described unauthorized $84,200.00 debt; that on to-wit: the 14th day of July, 1910, the Directors of the said City Bank & Trust Company refused to ratify or confirm said agreement made by the said C. H. Seals, Vice-President, and that the said item of $16,477.57 of the claim of the said Second National Bank which is herein contested, is an improper, unlawful and invalid charge against the Alabama Trust, City Bank or Guarantee Bank; and contestant avers upon information and belief that said C. H. Seals as Vice-President, had no power or authority to bind the City Bank & Trust Company by said agreement without the concurrence of the Board of Directors of said Bank; and contestant demands a strict accounting as to this item, and that the said Second National Bank produce in this Court, to the end that this item of the claim may be fairly adjusted, all books, documents, records and memoranda of every kind and description in its possession or under its control relating to said item or charge of $16,477.57.

7. Contestant, the said E. D. Smith, Receiver, is informed and believes, and upon such information and belief avers, that soon after the said Ben T. Head had disposed of his holdings in the Alabama Trust, he became on to-wit: December 29, 1908, the leading spirit in the incorporation of the said City Bank & Trust Company which was incorporated as hereinafter set out with an authorized capital of $100,000.00, divided into 1,000 shares; that the said Ben T. Head's

brother, R. C. Head, subscribed for 754 shares of the capital stock of the said City Bank in the name of "R. C. Head, Agent"; that on December 29, 1908, R. C. Head, Agent, Ben T. Head and J. S. Head, Jr. (the said Heads being brothers) executed a demand note for $75,400.00 to the same said Second National Bank; that on same date, R. C. Head, Agent, gave the City Bank & Trust Company a check on the said Second National Bank for $75,400.00, covering the amount due on his subscription for the capital stock of said City Bank; that this check or draft with others aggregating a total of $100,000.00, was sent to the said Second National Bank for credit of the said City Bank and was the opening entry in the account between the said City Bank and the said Second National Bank;

81 that of the $100,000.00 so transmitted to the said Second National Bank for credit of the said City Bank, the sum of $93,536.00 was in the form of checks drawn on the said Second National Bank to be pledged with itself as a credit to said City Bank; that $2,000.00 so transferred to the said Second National Bank was by a check or draft on a bank in Ashland, Ky., controlled by Thomas Boggess, Jr., and that $2,500. so transferred to the said Second National Bank for credit of the City Bank, was by check or draft on the Peoples Trust Company, of Madison, Indiana, in which the said Ben T. Head was a stockholder; and contestant is informed and believes and upon such information and belief states the facts to be that the said Second National Bank was informed of the manner of the incorporation of the said City Bank by the said Ben T. Head and his associates and the method by which the face or par value of the capital stock of the said City Bank was to be discharged or settled; and that the said Second National Bank was informed that the said note of $75,400.00, executed by the said R. C. Head, as agent, was for the payment of the capital stock of the said City Bank and that the said Second National Bank and the said Ben T. Head mutually agreed upon or adopted this unauthorized and illegal method of complying with the provisions of Sections 3446, 3447 and 3542 of the Code of Alabama; and that said contestant is informed and believes, and thereupon alleges as true that an amount equal to 60 per cent. of the capital stock of the said City Bank was not actually paid up in cash or that $25,000.00 of capital was not actually paid and employed in the business of said bank, as required by the above named Sections of the Code, at the time of its incorporation or for some time thereafter; that thus $98,036.00 of the face or par value of the capital stock of the said City Bank was purported to be paid in cash, while in reality it was not paid in cash, within the meaning of the statute, but in the unauthorized and unlawful manner aforesaid, which consisted of credit being given by the Second National Bank to the City Bank & Trust Company, the Second National Bank taking the notes of said individuals aforesaid with the intent and design, so contestant is informed and believes, of subsequently shifting the said individual liability (to it and converting it into a liability) of said City Bank & Trust Company and of permitting said individuals or others or both, to give their notes to said City Bank & Trust Company for said indebtedness, or a large part thereof; thus effecting a payment of the

capital stock of said City Bank & Trust Company by notes and
82 not by cash as required in the said Code Sections cited, or even without such process of applying the assets of the City Bank to such notes; and contestant is further informed and believes, and so avers that following the above described unauthorized and unlawful method of the incorporation of the said City Bank, the first evidence of the said collusive and unlawful arrangement perpetrated upon the said City Bank and its depositors by the said "R. C. Head, Agent" and his said associates and Second National Bank, was disclosed on to-wit: January 4th, 1909, ten days before the said City Bank, on to-wit: January 14th, 1909, was opened up for business, when at a meeting of the Board of Directors of said City Bank, the minutes of which meeting were signed by "Ben T. Head, President," and by "R. C. Head, Secretary," the following resolution was passed:

"That we hereby authorize the Second National Bank of Cincinnati, Ohio, to charge to our account, at any time that it appears to them that it is to their interest to do so, the note of R. C. Head, Agent, of $75,400.00, or any part of it that may remain unpaid at the time. Motion carried unanimously."

That on the same day, to-wit: January 4th, 1909, the said "Ben T. Head, President," wrote the following to G. W. Williams, Cashier of the said Second National Bank:

"DEAR SIR: As per your request, I enclose you herewith resolution adopted by the Board of Directors of the City Bank & Trust Company, held this day. If this does not meet with your approval, please send me a copy of the form you want and we will gladly conform to your wishes."

That on to-wit: January 6th, 1909, the said G. W. Williams, Cashier of the said Second National Bank replied to the said Ben T. Head, President of the said City Bank, as follows:

"DEAR SIR: I have your favor of the 4th inst. enclosing resolutions of your Directors covering $75,400.00 note. I notice you have omitted putting seal of the bank on the resolution. However, we will not return it for that purpose. * * * Hoping your efforts will prove successful in the interest of your new institution, and with personal regards, I beg to remain, Yours very truly."

Contestant is further informed and believes and upon such information and belief alleges that one Thomas Boggess, Jr., a resident of
83 Ashland, Ky., and a Director of said City Bank, was apprised of and familiar with the mutual understanding between the said Ben T. Head, R. C. Head and the said Second National Bank concerning the manner and method of discharging the amount due and required to be paid in under the statute for the capital stock of the said City Bank, and also the manner in which it was to be carried merely on the books of the said banks as book entries without the cash payment of any money; and that the said Boggess being appraised of the said mutual agreement existing between the said Ben T. Head, R. C. Head and the said Second National Bank, on to-wit: January 1st, 1909, wrote from the Grand Central Depot, Cincin-

nati, Ohio, to the said Ben T. Head, President of said City Bank, as follows:

"DEAR SIR: I believe you should call a meeting of your Directors tomorrow (Saturday) and pass the resolution as per request of Mr. Williams of the Second National Bank of Cincinnati, O. I approve of it and you will find the Second National Bank will not take any advantage of our Bank in any way, but will give their support. I would take up the placing of stock at once. I will write you on my arrival home. I will write Mr. Williams tonight, so he will receive it tomorrow morning, as I have only a few minutes here and not time enough to go over to the Bank to see him.

And contestant is also informed and believes, and upon such information and belief, and from the correspondence in his possession between the officers of said banks during the period from January, 1909, to September, 1910, avers that the said Second National Bank controlled and dominated the actions of the officers of the said City Bank and said Guarantee Bank and shaped the affairs of said City Bank and said Guarantee Bank in its interest and for its benefit; that there existed an agreement during such period between the respective officers of the said banks, that the said City Bank should carry and keep of the deposits of the said City Bank, with the Second National Bank, an amount, to begin with, equal to $75,400.00, the amount of the capital stock of "R. C. Head, Agent," and that this balance so taken from the deposits and assets of the said City Bank and placed with said Second National Bank was to decrease as the capital stock of the City Bank was sold and the proceeds of stock sales deposited with said Second National Bank and applied on said R. C. Head, Agent, note, and as — collateral of said City Bank, hypothecated with the said Second National Bank was collected and applied on the said R. C. Head, Agent, capital stock note; that it appears from a copy of the R. C. Head, Agent, note, now in the possession of the contestant, the said E. D. Smith, Receiver, that on October 5th, 1910, when said contestant was appointed and qualified as Receiver in this Court in this cause and took charge of the affairs of the said Guarantee Bank, that credits for stock sales to various persons at different times amounting to $49,500.00, had been endorsed upon said copy of said note, which left, on this basis at that time, $25,900.00 due on the capital stock note of R. C. Head, Agent, for $75,400.00; that the said Second National Bank collected to-wit: the sum of $11,200.00 on notes sent to it as collateral by the said City Bank in the course of their numerous transactions; that this amount was arbitrarily and illegally credited by the Second National Bank on the said capital stock note of R. C. Head, Agent; that this arbitrary and unauthorized application by the said Second National Bank of said amount of $11,200.00 so collected by it from collateral notes demanded and required from said City Bank by the said Second National Bank during the course of its numerous and various transactions, compelled the officers of said City Bank, who under the existing mutual agreement aforesaid, had reached the point by reason of impending financial disaster, of imperative submissiveness to the demands and terms of the said Second National Bank, to balance and

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cover on the books of the said City Bank such misappropriation of said amount so collected and credited by the said Second National Bank on the capital stock note of R. C. Head, Agent, and that this was accomplished by the officers of the said City Bank by the execution to the said City Bank of additional notes of the said R. C. Head, Agent, who was then Secretary of the said City Bank, aggregating the said amount of $11,200.00; that the said Second National Bank made other collections on collateral in its hands belonging to the City Bank, amounting to the sum of $1,100.00, and applied the same in like manner, on the capital stock note of R. C. Head, Agent, and that these unauthorized and unlawful credits by the said Second National Bank, from the collection of the collateral aforesaid, on the capital stock note of R. C. Head, Agent, reduced the balance due on said capital stock note of R. C. Head, Agent, to about, to-wit: the sum of $13,500.00, and that this was the condition of the balance due on the said capital stock note of R. C. Head, Agent, on to-wit: September 27th, 1910, the said City Bank & Trust Company having changed its name to the said Guarantee Bank & Trust Company on to-wit: May 23rd, 1910.

85 8. Contestant is informed and believes and upon such information and belief avers that on or about the last named date, to-wit, September 27th, 1910, the said E. E. Galbreath, Vice-President of the said Second National Bank, came again to Birmingham, and the relative condition still existing between those in control of the said Guarantee Bank and the said Second National Bank, induced or demanded that the said Guarantee Bank execute a demand note for $13,000.00 to the said Second National Bank; that said note was executed on said date in the name of the Guarantee Bank & Trust Company, by E. C. Dunn, Cashier, and that said note was executed for the purpose of settling the balance due on the basis above outlined, on the said capital stock note of R. C. Head, Agent; and contestant avers that the execution of said note by the Guarantee Bank & Trust Company and in the manner and for the purpose stated, was unauthorized and illegal and constituted a fraud upon the said Guarantee Bank and its depositors, and resulted in changing the balance due on said R. C. Head, Agent, capital stock note, from a personal liability of R. C. Head, Agent, to a charge and obligation against the said Guarantee Bank; that the books and accounts of said Guarantee Bank show no entry of the making of said note, nor any authorization for the execution thereof, except an unsigned record of Minutes of the Board of Directors held on September 26th, 1910; contestant denies both the correctness and validity of the said item of indebtedness of $13,000.00, evidenced by said note of September 27th, 1910, and which forms a part of the claim of $57,379.57 filed in this cause in this Court by the said Second National Bank. And contestant makes a demand on the said Second National Bank to produce all books, records, documents, accounts and memoranda of every kind and description in its possession or under its control in any way relating to the capital stock note of the said R. C. Head, Agent, including a list of all sums collected and credited on said capital stock note of R. C. Head, Agent.

9. Contestant further states that said unsigned record of minutes

of the Board of Directors of said Guarantee Bank, held on September 26th, 1910, contained the following:

"The matter of the R. C. Head, Agent, note was discussed at length, and upon motion duly seconded the following resolution was passed:

"Resolved: That the President and or Cashier be, and they are hereby authorized to straighten out the matter of what is known as the R. C. Head, Agent, note, and the Geo. M. Webb, Trustee, note, both of which were given for the purpose of getting off the applications for subscriptions to the capital stock of the Company, the said Geo. M. Webb, Trustee, note having been given for the purpose of taking up and cancelling the R. C. Head, Agent, note, and that: In so doing they be, and are hereby authorized and directed to make such entires and corrections of entries on the books of the company as might be necessary for the purpose of carrying out the original intentions in said matters;

"Further: That they be, and are hereby authorized and directed to make such settlement with the Second National Bank of Cincinnati, Ohio, as may be proper and right, and required by the obligation entered into in regard to said matters."

And that confirmatory of the numerous unusual transactions between the said banks, contestant avers that said G. W. Williams, Cashier of the said Second National Bank, on to-wit, September 10th, 1910, wrote the following to the said E. C. Dunn, Cashier of the said Guarantee Bank:

"DEAR MR. DUNN: There are several matters in connection with our respective institutions, about which I have intended to write you for some time, but in the rush of business have overlooked same. It seems we have not received the interest on the Head, Agent, note, amounting to $409.93, which was due August 1st; nor on the balance of the Alabama Trust indebtedness amounting to $16,554.67, acknowledged in the settlement of our tangled affairs—the interest on which to August 1st, amounted to $499.09. Your account has been overdrawn $554.95. I am sure if you will look into these matters you will find they are all according to agreement made in the settlement of the tangle between our two banks. Kindly give same your immediate attention, write me and oblige,

Yours very truly,"

10. Contestant is further informed and believes and upon such information and belief avers that by the said methods and the manipulation of book entries hereinbefore described, where no cash money was paid by the various parties heretofore mentioned, cash assets of the said Alabama Trust and the said City Bank, were applied wrongfully by the said Second National Bank to the individual indebtedness of the various persons named herein and that in this manner, said Second National Bank aided, abetted and participated in many unlawful and unauthorized transactions with the said Ben T. Head, R. C. Head, the said G. T. Brannon and their said associates to the damage and financial loss of the said Alabama Trust and the said City Bank and the depositors and other creditors of said Banks.

11. Contestant denies that upon a proper settlement of accounts there would be, for the reasons aforesaid, any indebtedness whatever due from the said City Bank or the said Alabama Trust, or the Guarantee Bank, or by the said E. D. Smith, Receiver, to the said Second National Bank, and avers and claims that for the reasons heretofore set forth, upon a proper settlement of all claims and accounts, the said Second National Bank would be indebted to the said E. D. Smith, Receiver, in the sum of to-wit, $12,000.00; contestant, the said E. D. Smith, Receiver, denies that as Receiver of the Guarantee Bank, he owes to the said Second National Bank the sum of $7,496.50 for balance due on note of the said City Bank & Trust Company for $25,000.00, dated December 22, 1909; that as such Receiver, he denies that he owes the said Second National Bank the sum of $2,655.52 for balance due on note of Guarantee Bank for $4,000.00, dated September 22, 1910; that as such Receiver he denies that he owes the said Second National Bank the sum of $12,650.00 for balance due on note of the Guarantee Bank & Trust Company for $13,000.00, dated September 27, 1910; that as such Receiver he denies that there is due from him to said Second National Bank the sum of $8,000.00 for balance due on note of City Bank & Trust Company for $10,000.00, dated April 4, 1910; that as such Receiver he denies that there is due from him to the said Second National Bank, the sum of $16,477.57, balance due on notes of Alabama Trust & Savings Comp-ny under the alleged contract dated March 22, 1910, and executed by C. H. Seals, Vice-President for the City Bank & Trust Company and G. W. Williams, Cashier for the said Second National Bank; that as such Receiver he denies that he owes the Second National Bank any sum for interest on any of said above amounts claimed by the Second National Bank to be due to it; and the said E. D. Smith, Receiver as aforesaid, denies that the said Alabama Trust or the said City Bank, or the said Guarantee Bank, or that he, as Receiver of the said Guarantee Bank, is due the said Second National Bank the sum of $57,379.59, or any part of such sum or any interest on said amount or interest on any part of said amount.

12. Contestant, the said E. D. Smith, Receiver, avers that on to-wit, December 30, 1910, the said Second National Bank without authority and improperly and illegally, at public sale in the City of Cincinnati, sold the following collateral justly belonging to the said Guar-
88 antee Bank & Trust Company, for to-wit, the sum of $6,195.00 and unjustly, wrongfully and improperly applied it on the said alleged indebtedness of the said City Bank or Guarantee Bank or the said E. D. Smith, as Receiver of the said Guarantee Bank, to said Second National Bank, to-wit:

One note of C. H. Butler, for $124.64, dated June 14, 1910.

One note of Queenstown Hotel & Improvement Company for $1,100.00, dated August 15, 1910.

One note of Queenstown Mfg. Company for $5,000.00, dated May 27, 1910.

One note of Queenstown Mfg. Company, for $2,500.00, dated March 16, 1910.

One note of Queenstown Mfg. Company, for $2,500.00, dated March 16, 1910.

One note of Queenstown Mfg. Company, for $5,000.00, dated April 16, 1910.

One note of Queenstown Mfg. Company, for $5,000.00, dated April 16, 1910.

One note of M. R. McNeil for $1,000.00, dated March 7, 1910.

One note of M. R. McNeil for $3,300.00, dated July 20, 1910.

One note of T. H. Friel for $500.00, dated August 22, 1910.

One note of Hinds Peevy for $2,000.00, dated Sept. 9, 1910.

One note of W. T. Herren for $2,700.00, dated Oct. 27, 1910.

400 shares of the capital stock of Co-operative Agency Company of Rome, Ga.

250 shares of the capital stock of the Western & Atlantic Fire Insurance Company of Nashville, Tennessee.

77 shares of the capital stock of the Bank of Pratt City.

671 shares of the capital stock of the Alabama Trust.

13. Contestant, the said E. D. Smith, Receiver, avers that for the purpose of properly and adequately passing upon the several issues arising from this contest of the claim filed by the said Second National Bank in this cause, and the challenge by this contestant of the correctness and validity of each and every item of indebtedness listed on the claimant's schedule, the production by the Second National Bank of all books, documents, records and memoranda of every kind and description in its possession or under its control, in any way relating to the said claim of $57,379.59, or to any part thereof or to any securities relating to said claim or any part thereof, will
89 be absolutely necessary; and contestant, said E. D. Smith, Receiver, hereby gives notice of his demand for the submission by the Second National Bank of all such documentary evidence, and that the same be produced in this Court by the said Second National Bank for the full and complete examination by this Court and the parties to this proceeding; and contestant avers that the production thereof will be necessary in adjusting and propounding the said claim of the said Second National Bank and therefore gives notice of his demand upon the said Second National Bank to produce in this Court for the examination of the parties interested in this contest, all accounts, books, documents and memoranda of every kind and description in its possession or under its control concerning or relating to any and all transactions with the said Second National Bank, or with the said Alabama Trust or with the said City Bank or with the said Guarantee Bank, and with the following persons: The said Ben T. Head; Ben F. Barbour; Enos R. Stewart; G. T. Brannon; Ector H. Smith; Interstate Securities Company; W. K. Smith; R. C. Head, individually and as Agent; R. S. Head; Mrs. Ben T. Head; S. P. King; W. M. Drennen; E. C. Dunn; Geo. M. Webb, individually and as Trustee; W. E. Spink; J. R. Lewis; John W. Worthington; Harry Andrews; C. R. Patterson; D. E. Hunt; Chas. McCrery; S. R. Guarino; Dave Wurtzberger; Mrs. A. B. Davis; H. S. Davis; R. H. Walker; Shades Mountain Land Company; W. H. Porter; R. E. Grace; Randolph Lumber Company; C. L. Lancaster; Queenstown Manufacturing Company; T. W. Howard; R. W. Massey; Mrs. M. S. Head; T. C. Banks; C. L. Guice; Thomas Boggess, Jr.; Citizens Bank & Trust Company of Ashland, Kentucky; Peoples Trust Company of

Madison, Indiana, and the accounts of all persons, firms or corporations relating or referring to or in any way concerning any dealing or transaction directly or indirectly by and between the said Second National Bank and said parties and the Second National Bank, and the said Alabama Trust or the said City Bank or the said Guarantee Bank during the period from September 30, 1908, down to and including the present time.

The Premises Considered, contestant, the said E. D. Smith, Receiver, prays that upon the final hearing of this contest, and for the reasons aforesaid, that the claim of the said Second National Bank for the sum of $57,379.59, the total indebtedness alleged to be due it from the estate of Guarantee Bank & Trust Company, be cancelled and decreed null and void; contestant prays that the item of
90 $7,496.50 of said claim for the alleged balance due on said note of City Bank & Trust Company, dated December 22, 1909, be cancelled and decreed null and void; that the item of $10,000.00, alleged to be due on note of City Bank & Trust Company, dated May 4th, 1910, be cancelled and decreed null and void; that the item of $12,750.00 of said claim alleged as balance due on note of the Guarantee Bank & Trust Company, dated September 27, 1910, be cancelled and decreed null and void; that the item of $8,000.00 on said claim for the alleged balance due on the note of City Bank & Trust Company, dated April 4, 1910, be cancelled and decreed null and void; that the item of $16,477.57, alleged to be due on note of the Alabama Trust & Savings Company on the contract aforesaid dated March 22, 1910, be cancelled and decreed null and void; and that all interest accruing on any or all part of said claim, on the final hearing thereof be cancelled and discharged.

And contestant further prays, upon the final hearing of this contest, that a final decree be made and entered against the said Second National Bank for the sum of to-wit, $12,000.00, or for any other sum which the said Second National Bank may be found indebted to the estate of the said Guarantee Bank & Trust Company.

Contestant further prays that notice be served upon Queenstown Hotel & Improvement Company; Queenstown Manufacturing Company; M. R. McNeil; T. H. Friel; Hinds Peevy; W. T. Herren, the authorized agent in Alabama of the Co-operative Agency Company of Rome, Georgia, and the authorized agent in Alabama of the Western & Atlantic Fire Insurance Company of Nashville, Tennessee, whose notes or stock, deposited as collateral with Second National Bank by the said Guarantee Bank, were unlawfully and without proper authority sold as aforesaid by said Second National Bank, restraining each and all of said parties and persons, separately and severally, from paying, compromising or settling in any manner, their said separate and several indebtedness, as evidenced by the separate and several notes or shares of stock heretofore listed and set forth, with the said Second National Bank, its agent or attorney or other representative or with any person or persons whatsoever until future orders of this Court.

And contestant further prays that if he has not asked for the proper relief, then he prays for such other, further and different

relief as the facts upon the final hearing hereof may warrant, and in equity and good conscience he may be entitled to.

And contestant will ever pray, etc.

J. B. GARBER,
Solicitor for Receiver.

On the foregoing is endorsed: Filed in office Feb. 9, 1911. J. W. Altman, Register in Chancery.

In the Chancery Court of Jefferson County, Alabama.

ALEX. M. GARBER, as Attorney General of Alabama,

vs.

GUARANTEE BANK & TRUST CO.

Petition of the Receiver for Leave to Compromise with the Second National Bank of Cincinnati.

To the Honorable Alfred H. Benners, Chancellor of said Court:

Your petitioner, E. D. Smith, Receiver of the Guarantee Bank & Trust Company, respectfully shows to the Court that at the time your petitioner was appointed Receiver of the Guarantee Bank & Trust Company, the Second National Bank of Cincinnati (hereinafter called the Second National Bank) held a large number of notes, certificates of stock, mortgages and other choses in action, which it claimed had been pledged to it by the Guarantee Bank & Trust Company (hereinafter called the Guarantee Bank) as collateral security for a large indebtedness claimed to be due by said Guarantee Bank to it, the Second National Bank. A list of said collateral so claimed by said Second National Bank, which was in its possession at the time the petitioner was appointed Receiver, as aforesaid, is hereto attached as Exhibit "A." In addition, there was in the hands of the Guarantee Bank at the time of said appointment, certain notes and the collateral thereto, a list of which is hereto attached as Exhibit "B"; which said Second National Bank of Cincinnati claimed had been pledged to it by the Guarantee Bank & Trust Company to secure the alleged indebtedness aforesaid and which it had sent to said Guarantee Bank & Trust Company for collection. In addition, said Second National Bank claimed that there had been pledged to it by the Guarantee Bank & Trust Company a certain mortgage executed by the Grand United Order of Gallilean Fishermen to the Tuskegee Land & Security Company, which had been transferred to said Guarantee Bank & Trust Company. By agreement between said Second National Bank of Cincinnati, and your petitioner, said last mentioned mortgage was foreclosed and the title acquired at foreclosure sale was conveyed under said agreement to petitioner, and is now in him. It is also claimed by said Second National Bank that all of the collateral, as shown by Exhibit "A" aforesaid, has been foreclosed and re-acquired by it from the purchaser at the sale thereof.

Your petitioner has heretofore instituted in the Supreme Court of
Cincinnati, in Cincinnati, Ohio, proceedings against said Second Na-
tional Bank of Cincinnati, by which he sought to restrain the said
said Second National Bank of said collateral as listed in Exhibit "A"
aforesaid, and to recover said notes, stocks and other choses in action
herein mentioned, but petitioner shows that the temporary injunction
prayed for by him in said suit has been denied and that said suit is
pending undisposed of.

In compliance with the decree of this Court made in this cause on
to-wit, November 8th, 1909, requiring all claims against the estate
which petitioner is administering, to be presented on or before
January 10th, 1911, said Second National Bank filed its claim in this
cause on to-wit, the 10th day of January, 1911, against said estate of
petitioner in the sum of $57,379.59. The docket number of the
claim in this cause is 1017, and is here referred to and made a part of
this petition. Subsequently, on to-wit, the — day of —— 1911, your
petitioner, as Receiver of the Guarantee Bank & Trust Company
under the terms fixed by the decree of this Court of November 8th,
1910, as aforesaid, filed a contest to said claim in this cause, in which
the correctness of said claim No. 1017 of the Second National Bank
for $57,379.59, was denied, and among other things, your petitioner
set up and claimed therein, that upon a proper and correct account-
ing and settlement, the said Second National Bank would be indebted
to said estate of petitioner in the sum of to-wit, $12,000.00. Said
contest filed as aforesaid by petitioner, as Receiver of the Guarantee
Bank & Trust Company, is here referred to and made a part hereof.
Petitioner has made a careful investigation of the claims and counter
claims involved in the controversy or issue raised by the claim of
Second National Bank, and the contest filed thereto by your peti-
tioner, wherein the said Bank claims said sum of $57,379.59, and
your petitioner, as Receiver aforesaid, claims on the other hand
due his said estate from said bank, the sum of, to-wit, $12,000.00.
In view of the great difficulty in securing a full hearing on peti-
tioner's contest and the number of intricate questions that would be
presented thereon which could not be fairly and satisfactorily de-
termined by the Court, short of the introduction of all the evi-
dentiary evidence demanded by complainant, and in view
of the fact also of the practical certainty that such litigation
would be long drawn out, expensive and balanced from a leg-
standpoint, in the usual doubt attendant upon equity proceed-
controversies, your petitioner has negotiated terms in writing in
presence, that he may be empowered in preserving the assets
claimed to be due from the said Second National Bank. He has ther-
now negotiated a compromise of all matters in controversy between
him as Receiver of the Guarantee Bank & Trust Company, and
Second National Bank, under and by virtue of which the latter
agrees that it will

1. On or upon the Second National Bank shall pay to petitioner
the sum of $ — and to execute their promissory note to
following same paid and to be paid as follows:

$ — on or before — days from date hereof, and

$ — on or before — days from date hereof, with interest
at the rate of 6 per cent per annum from date hereof, payable
semi-annually, and to be paid as follows:

$ — on or before — days from date hereof, with interest
at the rate of 6 per cent per annum from date hereof, payable
semi-annually, and to be paid as follows:

$ — on or before — days from date hereof, with interest
at the rate of 6 per cent per annum from date hereof, payable
semi-annually, and to be paid as follows:

And to secure the payment of said notes, Clarence [illegible] to convey to
Commissioners of a mortgage executed to the Central Union Trust
Company, Successors to Fidelity Land & Security Co.

[illegible] for taxes on the lands in Macon County, formerly owned by the Grand United Order of Galilean Fishermen.

[illegible] Corporation to date of [illegible] Petitioner's Agent at Tuskegee, Alabama, who has had charge of the renting, etc., of said lands. [illegible] be paid.)

2. Petitioner shall transfer, without recourse on him, to said Second National Bank all the real notes for the year 1917, held by him or his trust from the lands heretofore conveyed by said mortgage executed by said Grand United Order of Galilean Fishermen.

3. Petitioner shall pay and turn over to said Second National Bank the sum of $2400.00, received by him as a dividend on certain shares of Co-operative Insurance Company capital stock and $2000.00 paid him on note made by J. E. Kibbe, said stock and said note being among the collateral security which said Second National Bank claims as aforesaid.

4. Petitioner shall convey by quit-claim deed all his right, title and interest in and to said lands covered by said mortgage executed by said Grand United Order of Galilean Fishermen, which is described as the following lot of land in Macon County, to-wit:

The West half of Section 31, township 16, Range 22, containing 299 acres; the Northeast quarter of Section 31, township 16, Range 22, containing 140 acres; Section 30, township 16, Range 22, containing 611 acres; that part of Section 19, township 16, Range 22, lying South of Cubahatchie Creek, containing 22½ acres; the East
94 end of the South 80 of Northeast quarter of Section 6, township 15, Range 22, containing 35 acres; the Northwest quarter of Section 6, township 15, Range 22, containing 160 acres; the North half of Northeast quarter of Section 6, township 15, Range 22, containing 80 acres; the Southeast quarter of Section 31, township 16, Range 22, containing 160 acres; Section 36, township 16, Range 21, containing 640 acres; the North half of Section 1, township 15, Range 21, containing 320 acres, and a certain tract or parcel of land at the Pinkston Cross Roads in the Southeast corner of the Southwest quarter of Section 20, township 16, Range 21, containing 3⅛ acres, all of said tracts of land containing 2,485 acres.

Petitioner shall deliver possession of said lands above described to said Second National Bank of Cincinnati.

5. The said Second National Bank shall withdraw its said claim of $37,470.50 heretofore filed by it against the said estate of [illegible] petitioner, and shall abandon and fully satisfy the same as a claim against the estate. The said Second National Bank shall, however, participate in the dividends that may be declared to other depositors or creditors who have not acquiesced or entered on the following [illegible]

[illegible] the sum of $1,000.00 represented by a balance of $1,000.00 [illegible] to the Commercial Bank & Trust Company prior to the date of the receivership from one J. E. Kibbe, which amount was deposited in the said Commercial Bank & Trust Company, and not transferred to the said Second National Bank, which said bank holds the note of said Kibbe as collateral security and has also suit to the said Commercial Bank & Trust Company for collection.

8. The sum of $2,000.00, represented by a collection made in the

same manner by the said Guarantee Bank & Trust Company on the note of one S. P. King for the above amount, the said note having been held by the said Second National Bank as collateral security and the proceeds from same having been collected and retained by the said Guarantee Bank & Trust Company, prior to the receivership.

6. Petitioner as such Receiver, shall deliver, transfer and assign to said Second National Bank the notes and choses in action, that herein as Exhibit "B" without recourse on petitioner, together with all collateral thereto, and shall transfer and surrender, without recourse on petitioner, to said Second National Bank all his right, title and interest thereto.

7. Petitioner shall transfer and assign to said Second National Bank all his right, title and interest in and to all the notes, mortgages, shares of stock and other choses in action and securities listed herein as Exhibit "A," and in evidence of such transfer, shall endorse the same without recourse on him.

8. Petitioner shall surrender all claims of every kind and description which he has against said Second National Bank, and all claims to these notes, mortgages, certificates of stock or other choses in action now in its possession in or to which said Guarantee Bank may have had any right, title or interest whatsoever, which are listed and shown on said Exhibits "A" and "B," and the said Second National Bank shall also satisfy and surrender all claims of every kind and description which it holds against said estate of Guarantee Bank & Trust Company.

Petitioner believes and therefore avers that the compromise aforesaid is to the best interest of the estate which is being administered by him, and recommends that he be authorized to effectuate the same.

The premises considered, petitioner prays leave to make and execute the foregoing compromise with said Second National Bank of Cincinnati, and for leave to execute all proper instruments evidencing the same, and that the Court will order a reference to the Register of this Court to ascertain whether or not it is to the interest of the estate represented by him that said compromise shall be made, and for such other authority as may be proper in the premises.

E. D. SMITH,
Receiver of Guarantee Bank & Trust Company.

J. B. GARBER,
GARBER & GARBER,
His Attorneys.

STATE OF ALABAMA,
Jefferson County.

E. D. Smith being duly sworn, deposes and says that the averments of fact in the foregoing petition are true to the best of his knowledge, information and belief.

E. D. SMITH.

Sworn to and subscribed before me, this 14th day of October, 1911.

S. B. GARBER,
Notary Public.

Exhibit "A."

1. Note of Bank Deeds to Guarantee Bank & Trust Company, dated September 9th, 1910, for $2,000.00.

2. Mortgage of Queenstown Manufacturing Company to City Bank & Trust Company, dated April 1, 1910, and all indebtedness thereby secured, including the following notes made by the Queenstown Manufacturing Company to the City Bank & Trust Company:

One note for $2,500.00, dated March 15, 1910.
One note for $2,500.00, dated March 15, 1910.
One note for $5,000.00, dated April 1, 1910.
One note for $5,000.00, dated April 1, 1910.
Also one note for $5,000.00, dated May 27, 1910.

3. One note of Queenstown Hotel & Improvement Company to Guarantee Bank & Trust Company, dated August 15, 1910, for $1,100.00.

4. One note of B. T. Head for $1,140.00, dated September 26, 1910, payable to Guarantee Bank & Trust Company, with certificate for ten shares of the capital stock of National Building Company, certificate No. 18, as collateral thereto.

5. One note of T. H. Friel to City Bank & Trust Company for $900.00, dated August 11, 1910.

6. Notes of A. S. Smith as follows:

One note to City Bank & Trust Co. for $1,000.00, dated Jan. 5, 1910.

One note to City Bank & Trust Co. for $1,000.00, dated April 2, 1910.

One note to City Bank & Trust Co. for $1,000.00, dated Dec. 29, 1909.

One note to Guarantee Bank & Trust Co. for $1,000.00, dated July 27, 1910.

7. Certificate No. 19 for five shares of the capital stock of the Bank of Pain City.

8. Certificate No. 18 for five shares of the capital stock of the Bank of Pain City.

9. Certificate No. 31 for one share of the capital stock of the Bank of Pain City.

10. Certificate No. 32 for fourteen shares of the capital stock of the Bank of Pain City.

11. Certificate No. 34 for one share of the capital stock of the Bank of Pain City.

12. Certificate No. 35 for one share of the capital stock of the Bank of Pain City.

13. Certificate No. 38 for fifty shares of the capital stock of the Bank of Pain City.

14. Note of M. R. McNeil to Guarantee Bank & Trust Company for $3,300.00, dated July 20th, 1910.

15. Note of M. R. McNeil to City Bank & Trust Company for $1,000.00, dated May 7, 1910.

97 16. Note of W. S. Herron, dated October 27, 1909, for $2,700.00, payable to the order of himself, endorsed by himself to the City Bank & Trust Company.

17. One note of Alabama Trust & Savings Company for $10,000.00, dated May 1, 1909, payable to the order of themselves, endorsed by Alabama Trust & Savings Company and Tom Stobert, with two certificates of stock of Alabama Trust & Savings Company as collateral thereto, each for fifty shares, one numbered 242 and the other numbered 243.

18. Certificates of stock of the Alabama Trust & Savings Company, as follows:

Certificate No. 240, fifty shares.
" " 241, fifty shares.
" " 249, fifty shares.
" " 251, fifty shares.
" " 250, fifty shares.
" " 252, fifty shares.
" " 246, fifty shares.
" " 317, twenty-nine shares.
" " 247, twenty-five shares.
" " 248, twenty-five shares.
" " 254, seventy-five shares.
" " 255, seventy-five shares.
" " 256, seventy-five shares.
" " 258, seventeen shares.

19. Note of Hughes Produce Company for $1,000.00, to City Bank & Trust Company, dated February 16, 1909.

20. Four hundred shares of the capital stock of the Co-operative Agencies Company, of Rome, Georgia.

21. Two hundred and fifty shares of the capital stock of the Western & Atlantic Fire Insurance Company, of Nashville, Tenn.

22. Note of Enos R. Stewart for $15,000.00, payable to the Alabama Trust & Savings Company, dated May 1, 1909.

23. Note of Ector H. Smith for $15,000.00, dated May 1, 1909, payable to the Alabama Trust & Savings Company.

24. Note of Tom Stobert for $10,000.00, dated May 1, 1909, payable to Alabama Trust & Savings Company.

25. All notes and mortgages executed by the Grand United Order of Gallilean Fishermen to the Tuskegee Land & Security Company.

EXHIBIT "B."

List of Notes, Mortgages, Certificates of Stock and Other Choses in Action in Possession of E. D. Smith, Receiver of Guarantee
98 *Bank & Trust Company, Which He is to Deliver to Second National Bank of Cincinnati, and Surrender All His Rights, Title and Interest in and to said Second National Bank of Cincinnati.*

1. Two notes of the Queenstown Manufacturing Company, aggregating $5,000.00.
2. Mortgage or other security given by Queenstown Hotel & Improvement Company, securing the $1,100.00 note of that Company, now in the possession of the Second National Bank of Cincinnati.
3. All mortgages of A. S. Smith held by said Receiver.
4. Note of A. R. Dearborn for $1,000.00 with mortgage attached.
5. Note of Allgood & Friel, with deed and insurance policy $1,000.00.
6. Note of T. H. Friel and Max Harkins for $300.00.
7. Note of W. A. Chenoweth, with ten shares of City Bank & Trust Company stock, $1,000.00.

On the foregoing is endorsed: Filed in office Oct. 20, 1911. J. W. Altman, Register in Chancery.

In the Chancery Court of Jefferson County, Alabama.

ALEX. M. GARBER, as Attorney General of Alabama,

vs.

GUARANTEE BANK & TRUST CO.

Decree on the Petition of the Receiver for Leave to Compromise with the Second National Bank of Cincinnati.

This cause coming on to be heard on this day on the petition of the Receiver, E. D. Smith, heretofore appointed in this cause, for leave to compromise with the Second National Bank of Cincinnati, and there appearing the Solicitors for the parties, as well as the Receiver in person, and attorney for Second National Bank of Cincinnati, and it appearing that George Huddleston, Esq., the Solicitor of record for Tuskegee Land & Security Company, and for W. C. Sterrett, Receiver of the Alabama Trust & Savings Company, had been served with notice of said petition and the hearing thereof, and E. H. Dryer, Esq., appearing in person as amicus curiæ, and it being made to appear to the Court that the averments of the petition are true, and the propriety of the Court granting the order prayed for being fully argued, the Court is of the opinion that the prayer of the petition should be granted.

It is therefore, ordered, adjudged and decreed that E. D. Smith, as

Receiver of the Guarantee Bank & Trust Company, be and he
99 is hereby authorized and empowered to compromise the matters in dispute between him, as such Receiver, and Second National Bank of Cincinnati, which are set forth in said petition, upon the terms and conditions in said petition set forth; that is to say, upon the payment by the Second National Bank of Cincinnati to said Receiver of the sum of seventy-five hundred dollars, and upon its reimbursing the Receiver in the sum of Four Hundred dollars paid by him to A. C. and H. R. Howze, attorney's fee; and the sum of $156.91 paid by him for taxes on certain lands in Macon County, Alabama; and the sum of two hundred and fifty dollars, compensation of R. H. Powell, said Receiver's agent, the Receiver shall transfer, without recourse on him, to the said Second National Bank of Cincinnati all rent notes for the year 1911, held by him for rent from the lands heretofore conveyed by the mortgage executed by the Grand United Order of Gallilean Fishermen, referred to in the petition.

The Receiver shall further turn over to said Second National Bank of Cincinnati the sum of two hundred and forty dollars, received by the Receiver as dividends on certain shares of stock; and the further sum of two hundred dollars paid him on a note made by J. E. Ellis.

The Receiver shall further convey by quit-claim deed all his right, title and interest in and to said lands covered by the mortgage executed by the Grand United Order of Gallilean Fishermen to the Tuskegee Land & Security Company which lands are described as follows:

The following lot of land in Macon County, Alabama, to-wit:

The West half of Section 31, township 16, Range 22, containing 299 acres; the Northeast quarter of Section 31, township 16, Range 22, containing 140 acres; Section 30, township 16, Range 22, containing 611 acres; that part of Section 19, township 16, Range 22, lying South of Cubahatchie Creek, containing 22½ acres; the East end of the South 80 of Northeast quarter of Section 6, township 15, Range 22, containing 35 acres; the Northwest quarter of Section 6, township 15, Range 22, containing 160 acres; the North half of Northeast quarter of Section 6, township 15, Range 22, containing 80 acres; the Southeast quarter of Section 31, township 16, Range 22, containing 160 acres; Section 36, township 16, Range 21, containing 640 acres; the North half of Section 1, township 15, Range 21, containing 320 acres, and a certain tract or parcel of land at the Pinkston Cross Roads in the Southeast corner of the Southwest quarter of Section 26, township 16, Range 21, containing 3⅛ acres, all of said tracts of land containing 2,485 acres.

100 The Receiver shall further deliver possession of said lands to Second National Bank of Cincinnati.

As a condition of said compromise, the Second National Bank of Cincinnati shall withdraw its claim for $57,379.59, heretofore filed by it against the estate being administered by said Receiver, and shall abandon and fully satisfy the same as a claim against said estate, but the said Second National Bank of Cincinnati shall, however, participate in the dividends that may be declared to other depositors or creditors who have not stipulated for interest out of said estate on two

claims, one for one thousand dollars, and the other for two thousand dollars, being the claims referred to in paragraph 5 of said petition.

The Receiver shall further deliver, transfer and assign to said Second National Bank of Cincinnati the notes and choses in action listed in Exhibit "B" to the petition, without recourse on him, together with all collateral thereto, and shall transfer and surrender, without recourse on the Receiver, to said Second National Bank of Cincinnati all his right, title and interest therein.

The Receiver shall further transfer and assign to said Second National Bank of Cincinnati all his right, title and interest in and to all the notes, mortgages, shares of stock and other choses in action, and securities listed in Exhibit "A" to the petition, and in evidence of such transfer shall endorse the same, without recourse on him.

The Receiver shall further surrender all claims of every kind and description which he has against said Second National Bank of Cincinnati, and all claim to said notes, mortgage, certificates of stock or other choses in action, now in his possession, in or to which said Guarantee Bank & Trust Company or its estate, may have any right, title or interest whatsoever, which are listed and shown in said Exhibits "A" and "B"; and said Second National Bank of Cincinnati shall satisfy and surrender all claims of every kind and description which it holds against said estate of the Guarantee Bank & Trust Company, except said items of one Thousand Dollars and Two Thousand Dollars, hereinabove referred to.

This decree shall be without prejudice to any rights of W. C. Sterrett as Receiver of the Alabama Trust & Savings Company, or of Tuskegee Land & Security Company.

Witness the Honorable Alfred H. Benners, Chancellor, this 28th day of October, 1911.

ALFRED H. BENNERS,
Chancellor.

On the foregoing is endorsed: Filed and enrolled Oct. 28, 1911. J. W. Altman, Register in Chancery.

101 STATE OF ALABAMA,
Jefferson County:

I, Henry Morschheimer, Register in Chancery in and for the Fifth District of the Northwestern Chancery Division of Alabama, hereby certify that the foregoing is a true and complete copy of the following papers, filed in cause 5733, in which Alex. M. Garber, Attorney-General, is complainant, and Guarantee Bank & Trust Company is respondent, to-wit: Claim of The Second National Bank of Cincinnati, Ohio; contest of claim of Second National Bank of Cincinnati; petition of Receiver for leave to compromise differences with Second National Bank of Cincinnati, and decree of settlement with Second National Bank of Cincinnati, filed and enrolled Oct. 28, 1911. All of which remain of record in this office.

Witness my hand and seal, this March 28, 1914.

[SEAL.] HENRY MORSCHHEIMER,
Register in Chancery.

STATE OF ALABAMA,
Jefferson County:

I, Alfred H. Benners, Chancellor of the Fifth District of the Northwestern Chancery Division of Alabama, do hereby certify that Henry Morschheimer, whose name is signed to the preceding certificate of exemplification, is the Register in Chancery for said Fifth District of the Northwestern Chancery Division of Alabama, duly appointed and sworn, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the said exemplification is the seal of said Chancery Court, and that the attestation thereof is in due form of law.

This 28th day of March, 1914.

ALFRED H. BENNERS,
Chancellor of Fifth District of Northwestern Chancery Division of Alabama.

THE STATE OF ALABAMA,
Jefferson County:

I, Henry Morschheimer, Register in Chancery in and for the Fifth District of the Northwestern Chancery Division of Alabama, do hereby certify that Hon. Alfred H. Benners, whose name is signed to the foregoing certificate is the Chancellor of the Fifth District, Northwestern Chancery Division of Alabama, duly elected and sworn, and that the signature of said Chancellor is genuine.

In witness whereof I have her-to set my hand and affixed the seal of said Court, this 28th day of March, 1914.

[SEAL.] HENRY MORSCHHEIMER,
Register in Chancery.

102 *Motion to Strike Out of Answer.*

(Filed July 9, 1914.)

Comes the plaintiff and moves the court to strike out, as insufficient, the following respective parts of defendant's answer to the amended bill, which are set up in said answer for affirmative defense thereto, to-wit:

First. The part thereof which reads as follows:

"This plaintiff avers that on or about the time of said transfer it was advised by the officers of the Alabama Trust & Savings Company that the assets of said Company had been transferred to said City Bank and Trust Company, which had assumed all liabilities of said Alabama Trust and Savings Company in consideration of the transfer of said assets, and that said City Bank was the owner of all of the assets formerly owned by said Alabama Trust and Savings Company, and was liable for all the debts of the same.

This defendant further avers that it had no knowledge of any objection on the part of any stockholder or creditor of said Alabama Trust and Savings Company to said sale and transfer.

This defendant avers that it had no interest whatsoever in said sale and transfer and received no benefit of any kind therefrom, and fur-

ther says that it supposed and believed, and still believes, that said transfer was a valid and legal transfer of the assets of said Alabama Trust and Savings Company and that more than ninety per cent. of the stockholders legally consented to said transfer and sale."

Second. The part thereof which reads as follows:

"And this defendant says that it believes and avers that said City Bank and Trust Company, in pursuance of said contract, paid and liquidated obligations of said Alabama Trust and Savings Company in an amount in excess of the value of all the assets and property received from said Alabama Trust and Savings Company."

Third. The part thereof which reads as follows:

"This defendant further says that no objection was made by any creditor or stockholder or depositor of said Alabama Trust and Savings Company, or by the Receiver thereof, to said sale until more than thirteen months thereafter, although they had full knowledge and notice of said sale and transfer, and not until after both of said banks had been placed in the hands of a receiver, but on the contrary acquiesced in the same, with full knowledge that transactions were being constantly had on the faith of said transfer being
103 valid in all respects; that by reason thereof the assets of said two banks became intermingled and it became impossible to separate the assets of one bank from the assets of the other, all without any fault on the part of this defendant; that by reason of said acquiescence and failure to object, this defendant was confirmed in its belief that said sale and transfer were valid and legal, and this defendant, acting upon such belief, had in due course of business, numerous transactions with said City Bank and Trust Company, in connection with which this defendant paid out large sums of money and assumed large liabilities, all to the knowledge of the stockholders, creditors and depositors of the Alabama Trust & Savings Company."

Fourth. The part thereof which reads as follows:

"This defendant further says that long prior to the filing of this suit, to-wit: on December 29th, 1910, Edward D. Smith, Receiver of the Guarantee Bank & Trust Company brought a certain suit, numbered 55936, upon the docket of the Superior Court of the City of Cincinnati, O., (Southern District of Ohio, Western Division), against this defendant, for an accounting, temporary injunction and other relief; that said Edward D. Smith as such Receiver, and being in full possession of all the books, records and papers and assets of the Guarantee Bank & Trust Company, formerly the City Bank and Trust Company, as well as those transferred by the Alabama Trust and Savings Company to the City Bank and Trust Company, claimed and alleged in said suit that the said City Bank and Trust Company purchased and took over by contract, on or about the 27th day of September, 1909, all of the assets of the said Alabama Trust and Savings Company and assumed all its liabilities in consideration of the transfer of said assets; that said Edward D. Smith, Receiver, further alleged the various dealings and transactions as set out in plaintiff's amended bill of complaint, and asked for an accounting upon the same, as the successor of said Alabama Trust and Savings Company, thereby treating said transfer and sale as in every respect valid and binding; and alleged that on a proper statement of accounting

and a proper settlement of all of said transactions, this defendant would be indebted to him as Receiver of said City Bank and Trust Company, in a sum exceeding Thirty-seven Thousand Seven Hundred ($37,700.00) Dollars, and praying further for an injunction to prevent the sale of certain collateral held by this defendant, a part of which was the same collateral referred to and set up in plaintiff's amended bill of complaint herein.

104 That such further proceedings were had in such action whereby said injunction was refused; that said action was prosecuted in error in the Circuit Court of Hamilton County, Ohio, as appears in cause numbered 5283 of said Circuit Court of Hamilton County, Ohio, which said Court affirmed the judgment of the Superior Court of Cincinnati, and refused said injunction for the reason that the plaintiff in said suit had an adequate remedy at law.

That the plaintiff in said suit, not desiring to prosecute the same further, secured the dismissal thereof in both of said Courts.

Defendant further alleges, on information and belief, that said suit in the Superior Court of Cincinnati, Ohio, was brought and prosecuted as set forth with the full knowledge and acquiescence of the complainant in this case."

Fifth. The part thereof which reads as follows:

"Defendant avers that by reason of the laches and failure to object and take any action to prevent the full consummation of said sale and transfer, the said Alabama Trust and Savings Company, its creditors, stockholders and receiver, are estopped from demanding the relief claimed in plaintiff's amended bill of complaint, if it should be found that said sale and transfer are, for any reason, void or voidable."

Sixth. The part thereof which reads as follows:

"For further defense, this defendant says that on or about the 25th day of September, 1909, said The Alabama Trust and Savings Company, of which complainant is receiver, by contract in writing, a copy of which is attached to said amended bill as an exhibit, did sell, assign, transfer and convey to the City Bank and Trust Company, the name of which was afterwards changed to The Guarantee Bank and Trust Company, all its assets and rights, credits and claims, of every kind, including those asserted in the said amended bill filed herein, and that said Guarantee Bank and Trust Company was subsequently placed in the hands of a receiver, namely: E. D. Smith, then and now a resident of, domiciled and having his place of abode in Birmingham, Jefferson County Alabama, all as appears on the face of said amended bill of complaint herein; and that complainant has failed to make said City Bank and Trust Company, the Guarantee Bank and Trust Company or said E. D. Smith, as Receiver of said Guarantee Bank and Trust Company, parties to either the original or said amended bill of complaint, and this defendant suggests to the Court and respectfully insists that said City Bank and Trust

105 Company, the Guarantee Bank and Trust Company and said E. D. Smith as Receiver of the Guarantee Bank and Trust Company, are necessary and indispensable parties to this suit; and defendant craves the same benefit for this suggestion as if made by way of specific plea to the amended bill raising such point."

Seventh. Exhibit "A" thereto and the part thereof which reads as follows:

"This defendant further says that, acting in good faith upon the belief that said City Bank and Trust Company was the valid and legal assignee of all of the assets of the Alabama Savings and Trust Company and that under said contract of sale, dated on or about the 25th day of September, 1909, said City Bank and Trust Company had assumed all of the obligations of said The Alabama Trust and Savings Company, it presented its duly verified claim, numbered 1017, on the docket of the Chancery Court of Jefferson County, Alabama, in said proceeding, wherein said Alexander M. Garber was plaintiff, and the Guarantee Bank and Trust Company, was defendant; that said claim included various notes executed by the said City Bank and Trust Company, the Guarantee Bank and Trust Company and the Alabama Trust and Savings Company; that thereafter said E. D. Smith, as receiver of the Guarantee Bank and Trust Company, filed, in such proceeding, a contest to said claim, and as ground for said contest set out as defense against said claims and as objections to the allowance thereof all and singular the facts set up in plaintiff's amended bill of complaint, the same being stated in substantially the same language as that contained in plaintiff's amended bill; that thereafter said E. D. Smith, as such receiver, filed a petition in said proceeding for leave to compromise all controversies with this defendant arising out of the various transactions set up and referred to in said objections to said claim of this defendant, including all of the claims, questions and issues set forth in plaintiff's amended bill of complaint filed herein.

That thereafter the Chancery Court of Jefferson County, Alabama, entered a decree in said Court upon the petition of said Receiver, fully settling and adjudicating all questions, claim and issues alleged, made or charged in the amended bill of complaint filed herein; a duly certified copy of said proof of claim, the objections thereto the petition for leave to compromise, and the decree of the Court is attached hereto and marked Exhibit "A," all of which proceedings were had and completed long prior to the filing of the original
106 bill herein, and with full knowledge of the plaintiff herein; George Huddleston, Esquire, appearing of record as Solicitor for the Tuskegee Land and Security Company, one of the alleged creditors of said Alabama Trust and Savings Company and as attorney for W. C. Sterrett, Receiver for the Alabama Trust and Savings Company and E. H. Dryer, one of the attorneys for complainant in this suit, appearing in person as amicus curiæ when said decree was entered in said court and consenting thereto, as set forth in said decree.

Wherefore, this defendant claims and alleges that all of the claims, demands and charges of the complainant herein have been fully adjudicated, settled and satisfied in a court of record and that complainant is fully bound and estopped by said prior adjudication."

PHILIP & S. C. ROETTINGER,
EDMUND H. DRYER,
Solicitors for Plaintiff.

The defendant accepts notice of and service of copy of the above and foregoing motion and waives issuance of copy by the Clerk. On this the — day of —— 1914.

—— ——,
—— ——,
—— ——,
—— ——,
—— ——,
Solicitors for Defendant.

Stipulation.

(Filed July 31, 1914.)

It is agreed between the parties to this suit that the additional testimony allowed to be taken under the former order of this
107 Court in this case may be taken before the sufficiency of certain parts of the answer to the amended bill is tested by the motion on file to strike out, including testimony which may be taken and offered on the one side to prove and the other side to defend against each and all such portions to which said motion is directed, and without prejudice to such motion; and that such motion be submitted for disposition by the Court with all the evidence offered on both sides at the final hearing; the purpose of this agreement being to speed the cause without splitting it up into separate submissions and without waiver by the plaintiff of his said motion and without prejudice to his rights for disposition thereof by the Court upon the merits of the motion upon such submission.

It is further agreed that however the Court may rule as to the sufficiency or insufficiency of the parts of the answer to which the motion is directed, the plaintiff need not file any reply to said answer after such ruling, but the cause shall be deemed at issue, and any new or affirmative matter in said answer shall be deemed to be denied by the plaintiff, and the taking of such additional testimony will proceed upon that theory and the issue thus joined.

Witness this 28th day of July, 1914.

PHILIP & S. C. ROETTINGER,
EDMUND H. DRYER,
Solicitors for Plaintiff.
J. B. FORAKER,
CHAS. M. LESLIE,
Solicitors for Defendant.

Opinion on Final Hearing.

(Filed November 20, 1915.)

SATER, *District Judge:*

Following the former submission and consideration of this
108 case, but before a final conclusion was reached, amended pleadings were filed and considerable important evidence

casting much additional light on the issues involved was taken. The case is now for decision on the present record and the helpful arguments made on its final submission.

The plaintiff's right to recover rests on his establishment of fraud. It devolves on him who alleges fraud to show the same by satisfactory evidence. Jones v. Simpson, 116 U. S., 609, 615. It is never presumed; and where it is alleged the facts sustaining it must be clearly made out. Farrar v. Churchill, 135 U. S., 609, 615; Walker v. Collins, 59 Fed. Rep., 70, 73, 74, C. C. A. 8. Where the evidence is capable of an innocent interpretation which makes it equally as consistent with the defendant's innocence as with his guilt, that meaning must be ascribed to it which accords with his innocence. 20 Cyc., 121; Morris v. Talcott, 96 N. Y., 100, 107.

When about to purchase of Cullom the 1,000 shares of stock of The Alabama Trust & Savings Company (hereinafter called the Alabama bank) for $100,000, Ben T. Head, who was Vice-President of a bank at Lexington, Kentucky, arranged with Williams, cashier of the defendant, that the latter bank should loan him the above named sum for that purpose. To secure the defendant Head agreed to give his note for the money borrowed and to deposit the stock to be purchased as collateral, and also during the life of the loan to keep continuously on deposit with the defendant not less than $100,000. He "expected to deposit all of the resources in the Second National Bank and keep it that way." It was also arranged that the defendant might charge the amount of his note or any part of it to the account of the Alabama Bank. The assets of that bank at the time of the purchase were $157,000, less an overdraft of $100. Head purchased the stock of the Alabama Bank from Cullom, borrowing $100,000 from the defendant, for which he gave his note, pledged as collateral to it the stock purchased, and also made a deposit with the defendant in the name of the Alabama Bank of more than $100,000. Soon thereafter, while Head owned in fact all the stock, the directory of the Alabama Bank, which was necessarily his own creation, adopted and forwarded to the defendant a resolution under date of October 10, 1908, which recites Head's loan and the attachment of his certificates of stock, and, to secure the defendant from any loss on his note, gave it permission to charge the note or any part of it, upon three days' notice, to the account of the Alabama Bank which was
109 then on deposit with defendant. The resolution was received and retained by the defendant. It may be noted that a resolution of like import was adopted by the directory of the Citizens Savings & Trust Company (hereinafter called the Trust Company) after its organization and was also transmitted to the defendant, the only objection interposed to which was that the corporate seal had been omitted, but the resolution was nevertheless retained by the defendant. Soon after Head made his purchase he sold the stock, excepting perhaps five shares, to Brannon and Smith, receiving a bonus of $4,000. Three thousand dollars had been paid on the Head note from the sale of stock. Subsequent like sales reduced it to $87,300. Brannon's and Smith's note or notes, as the case may be, were substituted for that of Head. They interested others with them and on January 10, 1909, the Alabama Bank sent to defendant seven notes

aggregating $87,300. Whether these notes were made payable to the Alabama Bank by the persons who took stock, or to Brannon and Smith, or to the stockholders themselves, and, in event of either of the latter two contingencies indorsed by the holder, is perhaps not entirely clear from the record, but it is established that, whoever the payee was, the notes were indorsed by the Alabama Bank. They were accompanied by the stock. The import of Stobert's evidence is that he never signed but one $10,000 note, and that he did so in January or February, 1909. He is manifestly in error, for aside from his note which was made at or about that time and forwarded to defendant, on January 19, he subsequently became indorser on a note dated May 1st following. The evidence of Leslie, Galbreath and Williams and the letter of June 3, 1909, by defendant's Vice-President to the Alabama Bank, acknowledges receipt of the seven notes dated May 1, 1909, and returning the seven notes above mentioned as having been forwarded to the defendant on January 19, require the finding that the notes so sent on the last named date were indorsed by the Alabama Bank. The defendant's letter of June 3 speaks of such notes as the notes of individuals and not of the bank. Leslie examined the notes as counsel to ascertain whether they should be protested or not. His knowledge was acquired in the performance of an employment and a duty and is entitled to much weight. The notes secured by the stock of the respective makers held as collateral were substituted for the note or notes of Brannon and Smith—their notes being returned to them. At that time or previous thereto
110 Head's note was returned to him. The stockholders whose names were respectively appended to the seven notes thus became primarily and the Bank contingently liable for the $87,300. The several notes represented the purchase price of the stock held by the respective stockholders. It is not shown or claimed that any purchaser of stock paid for his holdings from his own resources or that any one of such makers who took a part of the stock acquired by Brannon and Smith from Head paid Brannon and Smith for the stock so taken. Subsequent payments legitimately made reduced the debt to defendant to $84,200. The Alabama Bank did not maintain nor did the defendant require it to maintain its deposit at $100,000 or more. When it had checked its deposit down to somewhat more than $17,000 Galbreath went to Birmingham in the defendant's behalf and demanded payment of the above mentioned seven notes. Failing to secure it, he insisted that the form of the notes be so changed as to make the Alabama Bank primarily liable. The evidence is conflicting as to much that occurred, but action was not taken hastily or without prolonged discussion. The result was that the directors of the Alabama Bank consented to give the notes of the Bank for those already in the defendant's possession. Only one director was absent when the action was taken and the necessary inference to be drawn from Stewart's evidence is that such director was informed of the meeting but was merely unable to be present. Such action was never rescinded or repudiated. The notes which were signed by the Bank were not given under duress. They were executed by the Bank under date of May 1, 1909, made payable to "ourselves," and each stockholder indorsed the particular note which

presented the purchase price and face value of his stock. On June 1909, the defendant, in a letter to the Alabama Bank, acknowlged the receipt of such notes as follows:

One note for $15,000, indorsed by Brannon.
One note for $14,500.00, indorsed by the Interstate Securities mpany.
One note for $5,000, indorsed by Lewis.
One note for $10,000, indorsed by W. K. Smith.
One note for $15,000, indorsed by Ector H. Smith.
One note for $10,000, indorsed by Stobert.
One note for $15,000, indorsed by Stewart.

At the same time the defendant returned the notes theretofore ld by it, originally given for $87,300. As further security for the wly executed notes the defendant was given paper of the Alabama Bank to the extent, according to the plaintiff's evidence, of l $72,557.19. Other collateral to the amount, as plaintiff's evidence tends to show, of $60,038.05, was given then or about at time to protect loan of $28,000. It is further claimed that in the urse of the dealings between the two banks a large amount of colteral other than that above mentioned was also furnished to the dendant. Plaintiff's principal claim against the defendant rests upon ese various items of collateral. It also appears that the defendant plied funds of the Alabama Bank on deposit with it to the extent $10,000 on the note indorsed by Brannon and $7,200 on the note dorsed by W. K. Smith—such notes being two of those aggregating 4,200. From what has been said it will be seen that the subribers of 842 shares of stock in the Alabama Bank did not pay for but made the Bank itself liable for the same, and that the appro-iation of the Bank's money was without sanction of law. A bank n not be thus made a lawful indorser. A contract by virtue of hich it becomes such is void in the hands of a person having notice. orse on Banking, 4th ed., Sec. 65; National Bank of Commerce v. tkinson, 55 Fed. Rep., 465; Bowen v. Needles Nat. Bank, Fed. Rep. 430; Commercial Nat. Bank v. Pirie, 82 d. Rep., 799, C. C. A. 8. The Alabama rule is that "The contracts corporations, which they have no power to make, are void, and the urts can not enforce them. Promissory notes, or mortgages, given security to the corporation, are wanting in legal validity, and will t furnish a cause of action, in law or in equity." Chambers v. lkner, 65 Ala., 448.

There had been in Birmingham an institution known as the Citins Bank. It was absorbed by the Alabama Bank. The defendant ew of such absorption, but there is no evidence that it participated the same. Following the execution and delivery of the notes of ay 1, 1909, came the organization of the Trust Company and its sorption of the Alabama Bank which in the course of its existence d established eleven branches at as many points in Alabama. Head ys the mover for the formation of the Trust Company was King, t Head participated. It is not shown that the defendant had any rt in bringing the Trust Company into existence excepting that hen it was ready to do business the defendant gave credit for $100,-00, on the strength of what is known as the Head, Agent, note,

and certain other paper sent it. It is not shown that the defendant, aided, abetted or participated in the sale of the Alabama Bank
112 to the Trust Company, which sale was consummated after much negotiation on or about September 25, to become effective on September 27, 1909. That the defendant knew of the contemplated purchase and thought it might be helpful to both of the banking institutions appears from correspondence in evidence touching the consolidation, but that correspondence not only fails to show that defendant was a party to the negotiations, but was of such a character as would give assurance to defendant that the Trust Company was proceeding with due care and would not take over the Alabama Bank, unless an examination of its assets and liabilities gave assurance of safety in so doing. The indebtedness of the Alabama Bank to the defendant and the collateral held by the latter were determined by a visit of a representative of the Trust Company to Cincinnati, made for that purpose, and the liability to the defendant, including the unpaid portion of the $84,200, was recognized by the Trust Company as a valid debt. The net result of the correspondence is that the Trust Company found the Alabama Bank solvent and its purchase advisable. It does not appear that the defendant was made acquainted with the terms of the deal—at least, not with all of them,—although it must have learned that the Trust Company assumed all of the liabilities and became the owner of all the assets of the vendor bank. The defendant was not guilty of any fraud in connection with the formation of the Trust Company or the merger into it of the Alabama Bank. It is true that Head said in substance that he consulted and conferred with defendant, but he does not give any particulars. The record discloses nothing in this respect beyond an inquiry as to the standing of affairs between the defendant and the Alabama Bank. Subsequently the Trust Company changed its name to the Guaranty Bank & Trust Company (hereinafter called the Guaranty Company). Thereafter the Union Bank & Trust Company (hereinafter called the Union Bank) was organized. The Guaranty Company sold to it on December 6, 1909, all of the branch banks, save one, theretofore acquired by the Trust Company of the Alabama Bank. It now appears that although the holders of more than ninety per cent. of the stock of the Trust Company assented to the purchase of the Alabama Bank, there was no meeting of the stockholders called for that purpose and the holders of the residue of the stock were not consulted as to that transaction. It may be noted, however, in this connection, that any stockholder had a right under the Alabama law to inspect the books of the corporation, Foster v. White, 86
113 Ala., 467; that whether the organization of the Trust Company was in conformity to law or not, it was at least a de facto corporation and could be ousted only by the State, Bebb v. Hall, 101 Ala., 79, 96, 97; that the State Banking Department examined the bank and took no exception to its method of organization, and subsequently, after the bank's failure and when knowledge of its transactions had become known, elected to maintain suits in its behalf. It thus acquiesced in its corporate existence, State v. Webb, 97 Ala., 111, nor has it at any time sought to wrest from it its charter. As only six and one-half per cent. of the stockholders have filed claims

with the Receiver, it must be assumed that the others are either satisfied with or have acquiesced in the merger.

The Citizens Bank prior to its merger into the Alabama Bank had borrowed $28,000 of the defendant, which note was not satisfied until after the Alabama Bank had been consolidated with the Trust Company. The Alabama Bank on July 29, 1909, also borrowed $28,000 of the defendant and secured the same by collateral. Beginning with November 13, 1909, and ending with May 4, 1910, the defendant made a series of loans to the Trust Company under that name or the name of the Guaranty Company, aggregating about $100,000 or more. The payments made on such notes were the proceeds of collections of collateral held by the defendant, were legitimate, and are unassailable. Fifty thousand dollars of the sum loaned by defendant were taken up by the note of Webb, who was president of the Trust Company, which note remains unpaid. The making of large and repeated loans by defendant to the Trust Company and also the extension of credit by it to the Guaranty Company are utterly inconsistent with knowledge on its part of the insolvency of the Alabama Bank at the date of the transfer of its assets to the Trust Company, or of any fraudulent intent in the making of such transfer. It necessarily knew—at least was chargeable in law with the knowledge—that the stockholders whose notes aggregated $84,200 could not receive anything on their stock, if the Alabama Bank were to be closed out, but it did not know that its creditors or other stockholders would suffer any loss by such action. As regards the creditors and such other stockholders, the loans measure defendant's belief in the regularity and bona fides of that transaction. If it knew or believed the Alabama Bank to be insolvent, it knew or believed that the Trust Company had reduced its ability to pay, that the unpaid portion of
114 its $84,200 loan secured by the stock of the Alabama Bank was put in jeopardy, and that the Trust Company, if it did not know at the time of the transfer, must necessarily sooner or later learn that it would sustain a loss or become bankrupt according to the extent to which the assets of the Alabama Bank fell short of meeting its liabilities. The time of learning such fact would depend on the promptness with which creditors of the Alabama Bank presented their claims for payment. If the defendant had the knowledge or belief attributed to it by plaintiff, it is incredible that it would have extended credit by granting loans aggregating such a large amount. If it subsequently acquired such knowledge or belief, it must be presumed it would have ceased giving accommodations and pressed for payment of the loans already made and sums already due. Allusion has already been made to the assuring character of the communications from Head, when negotiations were pending between the two Birmingham institutions, and the belief they must have necessarily awakened on the part of defendant in the solvency of the Alabama Bank as regards creditors and such above mentioned other stockholders, and the integrity and wisdom of the consolidation of the two negotiating institutions. Its belief in the honesty and regularity of the transaction must have been heightened by the course pursued by the Trust Company and the Alabama Bank and the stockholders and creditors of both. The latter bank closed its door and ceased to do

business. The Trust Company took over and collected its assets, continued its business, and met its obligations as presented. No stockholder of either bank questioned the transaction, until about December 31, 1909 (Ex. F. C. 17), when the defendant was informed that, if the proceeds of collateral pledged with defendant for collection were credited on the notes which made up the $84,200, stockholders would immediately bring action on account of the same. The inference to be drawn from the record is that none of the 6½% of the stockholders in whose behalf this action is brought were among the complaining members. No creditor of either institution assailed it or was heard to complain. Creditors of both looked to the Trust Company for payment, and, as a matter of fact as much as about $42,000 were paid by the Trust Company to creditors in excess of what that company realized from the assets of the Alabama Bank. No objection was interposed until after the Trust Company failed. In the meantime, by virtue of such conduct on the part of the banks, the stockholders and creditors, the defendant having no
115 knowledge of any deceit or irregularity, if there was such, in consummating the deal, or of the insolvency of the Alabama Bank or of the Trust Company, if they were insolvent, or of the worthless character of any of the loans made by the Alabama Bank, by making loans for the accommodation of its successor (The Trust Company) resulting in advantage as to the creditors of both institutions, changed its position for the worse and so as to sustain a large loss. The assets of the two banks daily became more commingled, rendering it increasingly difficult, if not altogether impossible, to separate the respective holdings and liabilities of the two banks and to ascertain the true standing of either of them at the time of the merger. The evidence shows that some of the stockholders who have proved their claims learned of the merger, which, accord-ng to the plaintiff, was a matter of common notoriety and was noticed in the local papers. The witness, Abbott, it is true, states as a conclusion that the defendant knew in detail the affairs of the Trust Company, but conclusions are not evidence. The facts which he finally mentioned do not establish knowledge on defendant's part of the insolvency of the Alabama Bank or of the details of its sale to the Trust Company, especially in view of the evidence contained in the correspondence above mentioned and of Gutting's evidence that the defendant had no knowledge of any wrongful conduct as regards the merger or of any objection on the part of any stockholder or creditor to the transaction.

About the time the notes dated May 1, 1909, were executed and delivered by the Alabama Bank and respectively indorsed by its large stockholders, the deposit of the Alabama Bank with the defendant to the extent of $17,200 was credited, as heretofore mentioned, by defendant on the Brannon and W. K. Smith notes respectively, they representing a part of the $84,200. On March 22, 1910, the seven notes of May 1, 1909, represented a liability of $66,544.67 or thereabouts. A controversy having arisen between the Trust Company and the defendants as to the liability on such notes, Seals, as Vice-President of the Trust Company, called on defendant and the controversy between the

o institutions was settled, the Trust Company being released from bility on such notes to the extent of $50,000, but guaranteeing the yment of the residue of $16,544.67. The contract of settlement rther provided that if defendant should collect from the makers d indorsers of the notes a sum in excess of $50,000, the surplus would be returned to the Trust Company. The defendant 6 was also relieved by such contract from all liability on account of any payment theretofore made upon the notes. At the time at contract of compromise was made the defendant released and rrendered to the Trust Company all of the collateral which it then ld excepting such as would sufficiently protect the $16,544.67. othing was ever realized by defendant on any collateral held by it bsequent to such date of March 22, 1910, excepting $6,262.10, obined from the sale of such collateral in January, 1911. There ere, however, certain collections made (see p. 26 of Gutting's evience) from collateral not returned to the Guaranty Company. me of that pledged and retained by the defendant was in possession the Guaranty Company at the time it passed into the hands of the eceiver. The record does not show a want of diligence on the part the defendant in collecting pledged paper. It pursued the course ual in such cases. The renewal of notes and changes made in the llateral has made it difficult to trace those which were originally edged—a difficulty enhanced by want of records, or by the method keeping records, and by subsequent examinations of the defendt's books. The record fails to show that collateral, in so far as sold defendant, was not lawfully sold.

Without entering into a prolonged recital touching the collateral, may be said that the returns of collateral to the Trust Company Guaranty Company—they in fact being the same—were such at the plaintiff's claim for a recovery on account of the collateral edged is not sustained by the evidence, and that he can not recover n account of any collateral pledged to the defendant by the Alabama ank, the Trust Company, or the Guaranty Company, or on any ther account, unless it shall be found that he is entitled to recover e whole or a part of the $17,200 credited on the Brannon and mith notes, and any other small sum or sums representing the proeeds arising from the collection of paper pledged to the defendant ank, which were credited on some one or more of the notes originally ggregating $84,200. In the light of the conclusion hereafter eached, it is really immaterial, as to what became of the pledged ollateral (except to the extent of $400), or as to whether the defendnt knew or believed the Alabama Bank to be solvent or insolvent hen it was merged into the Trust Company.

The situation is this: Of the original loan of $100,000 to Head, $15,800 were rightfully paid by the application thereto of the 117 proceeds arising from the sale of bank stock; $50,000 were released as against the Alabama Bank and its successor through he arrangement made with Seals; $16,477.57 were never paid to the lefendant. If the Alabama Bank or its successor was injured at all, he injury could not exceed the difference between the aggregate of he above three items and $100,000, or $17,722.43. Whether the njury to such bank reached the last named sum or not depends upon

the amount applied on the Brannon and W. K. Smith notes out of the deposit of the Alabama Bank and from the proceeds, if any, of collections on collateral. Without entering into an extended review of the compromise settlement which was made by the defendant and the receiver of the Guaranty Company in the case of Garber, Attorney-General v. Guaranty Bank & Trust Company, in which substantially all of the alleged fraudulent matters were pleaded which are averred in this case, conclusions only will be stated. The settlement having been approved by a decree of the State court, the court's action operated as a judgment as between the Guaranty Company (and consequently the Trust Company) and the defendant, and settled all matters in controversy between them. Oglesby v. Antrill, 105 U. S., 605. Neither the Trust Company nor the Guaranty Company at any time attempted to rescind the contract of merger made between the Trust Company and the Alabama Bank. As between the Trust Company and the defendant such contract of merger was, by the court's decree approving the settlement, made valid, and the Guaranty Company and the Trust Company were precluded from ever assailing such contract and from ever attacking the defendant on account of its transactions with the Alabama Bank, the Trust Company and the Guaranty Company. Were this not so, the Guaranty Company and the Trust Company also would be indispensable parties to this suit. Coiron v. Millaudon, 19 How. 113. In Chadbourne v. Coe, 52 Fed. Rep., 479, an effort was made to set aside an alleged fraudulent conveyance by making the grantee only a party. It was said (p. 482) that if the court in a suit to which the grantor was not a party should compel the grantee to account for, and turn over, the property and money to the complainants, such a decree would be no bar to a suit by the grantor against his grantee, to compel the latter to account to him, according to the terms of their agreement, and for this reason the grantee has a right to insist that his grantor shall be made a party for his protection. The doctrine thus stated would be directly applicable had not the Trust Com-
118 pany and the Guaranty Company surrendered by their compromise settlement with the defendant all rights of every nature and character against the defendant. In the decree of settlement there was a recital that it should be "without prejudice to any rights of W. C. Sterrett as Receiver of the Alabama Trust & Savings Company or of Tuskegee Land & Security Company." There was pending at that time in the Chancery Court of Birmingham two cases Nos. 5866 and 6281, in the first of which the Tuskegee Land & Security Company was a party and in both of which the Alabama Company, the Guaranty Company (formerly the Trust Company), its Receiver, and the defendant were parties. The defendant contends that the "without prejudice" clause above quoted saved Sterrett's rights as to those two cases only. Considering that one of the reasons urged for the settlement between Sterrett as Receiver and the Receiver of the Union Bank was that Sterrett would get funds wherewith to *pro*secute a suit against the defendant, and the above reservation of rights made in the decree approving the settlement between the Guaranty Company and the defendant and also in the decrees of settlement made in the two above mentioned cases Nos. 5866 and

6281. I am constrained to hold that the "without prejudice" clause is to be given its usual legal meaning, and had no legal effect upon the rights of the plaintiff whatever, but left them open to settlement by legal controversy. 40 Cyc., 2130; Gennet v. Del. & H. Canal Co., 170 N. Y., 278, 282, 283; Lang's Heirs v. Waring, 25 Ala., 625, 60 Am. Dec., 533. The decree containing such "without prejudice" clause preserved the plaintiff's rights to pursue the defendant, and the defendant in its settlement with the Guaranty Company (Trust Company) assumed the risk of such course notwithstanding its adjustment with such Guaranty Company. The plaintiff, not being a party to the compromise settlement, was not bound by it. 8 Cyc., 522. Plaintiff's claim for a large recovery appeals to me as extravagant. It would be inequitable to permit him to recover more than the costs of this suit and the amount of the loss sustained by creditors and stockholders who have proved their claims in the case in which he is acting as Receiver. The amount of those claims with interest has not been computed by me. If counsel can not agree on them and will summarize the evidence regarding them or specifically direct my attention to the portions of the record touching them, I will either make the computation myself or refer the case to a Master to do that work and report his result. The recovery however, can
119 not exceed $17,200 and interest, plus the additional credits of $300.00 and $100.00 with interest. These last two credits on the notes appear to have been made from the proceeds of collateral pledged to the defendant. There are some minor credits on some or all of the notes which made up the original sum of $84,200. If there is a showing in the record as to the source from which they came, it has escaped my attention. They are therefore ignored. The view taken is that the arrangement to apply the money of the Alabama Bank, whether it was the money on deposit with the defendant or derived from collections on collateral, was illegal and can not be sustained against creditors and stockholders of the Alabama Bank who have not estopped themselves from sharing in the money so credited by defendant on notes, and that no such estoppel exists as against those who have proved their claims (the number and amount being small) which will defeat the present action.

There are many motions made by each of the parties. That the case may go to the higher court in the same form in which it was presented here, should any one elect to take it there, all such motions may be treated as overruled, and exceptions noted. A decree may be drawn along the lines above suggested, and if counsel are unable to agree as to the amount of the claims presented, with interest thereon, they will report that fact, and one or the other of the courses above suggested will then be pursued, dependent on the amount of work involved. It should be added that if any of the stockholders or other creditors of the Alabama Bank have received dividends on their stock or interest on their claims, such payment of dividends and interest will accrue to the benefit of the defendant in estimating the amount recoverable from it.

120 *Addenda to Opinion.*

(Filed May 1, 1916.)

SATER, *District Judge:*

The opinion filed November 20, 1915, shows that certain matters were determined tentatively rather than finally and that others were left open for further consideration of counsel and the court, with the suggestion that the case might go to a special master as to certain features, for the reason that this court is without skill either as a bookkeeper or an accountant. The court felt from the time the case was first presented that it was one for a master, but that view has never been shared by counsel.

As some, at least, of counsel placed a construction on the opinion at variance with what the court believes it to show either directly or by necessary implication, a letter was sent to local counsel representing the opposing parties for the purpose of clearing up any erroneous impressions that might exist. It is thought that the contents of such letter, as far as deemed material, may be made a part of this addenda to the opinion.

The view was reiterated that the plaintiff can not recover any more than the aggregate loss sustained by creditors and stockholders of the Alabama Trust & Savings Company who filed assertible claims and that the defendant can not be made to pay those who estopped themselves or who are barred from pressing claims and who can not meet the legal test required to obtain payment from the defendant; but whether this conclusion is sound or not is immaterial, if, as is found to be the fact, the sum adjudged against the defendant is less than the aggregate of the claims allowed by the Alabama state court.

The court is and at all times has been of the opinion that the original contract between Head and the defendant, in so far as it authorized the payment on Head's note out of the bank's fund, was illegal and unenforceable as against the Savings Company's creditors and innocent stockholders. This illegal provision persisted in the subsequent transactions when the notes of Brannon and Smith were substituted for those of Head and still later when the seven notes, being those of Brannon and Smith and their associates, were taken instead of those of Brannon and Smith alone. The provision, being illegal, was incapable of ratification so as to injure creditors and innocent stockholders of the Savings Company. That company could not lawfully bind itself or be bound by becoming indorser on the
121 notes of its stockholders or by giving its own notes in lieu of theirs—they becoming indorsers of the notes so given by it. The transaction of Head with the defendant and subsequently of Brannon and Smith and still later of the last named two and their associates contemplated payment, if need be, of the purchase price of the stock acquired by the respective makers of such notes out of the funds of the company. Authority so to pay was given the defendant and was acted upon by it to the extent hereinafter named, to-wit, $18,055.33. The circumstances, in my judgment, make it clear that the defendant knew all the while that neither Head, Brannon and

Smith, or the latter two with their immediate associates, had paid out of their own funds for the stock which they respectively claimed to have bought. The funds of a corporation may not be used to pay for the stock acquired by its stockholders. If funds of the Savings Company were used to pay interest on the $84,200, or any of it, such payment can not be sustained as against creditors and innocent stockholders who are in a position to assert a claim against the Savings Company.

Following such letter expressing the views above stated a hearing was had (both sides being represented), at which suggestions were made and discussed as to undetermined matters of fact and law. With reluctance the case was again taken on submission instead of being sent to a master. No additional briefs have been filed and consequently no analysis has been offered as to evidence reflecting on the amount of the claims which have been allowed by the Alabama court as valid and subsisting against the Savings Company, or as to whether there were any sums other than those mentioned in the opinion which were wrongfully applied by the defendant, or whether there was any interest paid from the funds of such company on notes held by the defendant on which it has been held the Savings Company could not lawfully be made liable; nor has authority been submitted as to the rule which should be applied as to the weight to be given (considering the state of the record) to claims allowed by the Alabama court. In the opinion filed it was found that two sums—one of $300 and another of $100—were wrongfully applied by the defendant. One of the briefs filed in behalf of defendant substantially admits the application of those sums although disputing that such application was wrongful. It was also found that $17,200 were credited by the defendant on the Brannon and W. K. Smith notes. The answer admits that on May 1, 1909, the defendant held on
122 deposit funds of the Savings Company to the amount of $17,655.33, none of which appears to have been returned to the Savings Company. It was out of that sum, as I understand the record, that the $17,200 were taken. Charging then the defendant with the $400 and the $17,655.33, the aggregate amount for which it should respond is $18,055.33, which should bear interest from May 1, 1909. This sum is less than the claims adjudged by the Alabama state court to be valid against the estate of the Savings Company. Plaintiff's counsel claimed in oral argument that the sums allowed by the Alabama court were $21,945.79. My figures make it somewhat less, but our data may be different. The precise amount, so long as it exceeds the amount due from the defendant, is not here important. As my attention has not been directed to any wrongful application by defendant of the Savings Company's funds to interest or principal (although a request was made that this be done) other than is above mentioned, it is assumed that there was none such, and that, if there was any such, the amount so applied is a negligible quantity. No authorities have been cited to show why the claims adjudged by the Alabama court to be valid as against the Savings Company should not be accepted as conclusive as against the defendant, nor has the court found any. No defense is pleaded to any of the judgments rendered by that court on the ground of pay-

ment, or fraud in procuring them, or want of jurisdiction on the part of the court entering them. On consideration, it is believed that full faith and credit should be given to such judgments. The principle involved is analogous to that invoked when a judgment is rendered in favor of creditors against an insolvent corporation and suit is subsequently brought by the receiver of such corporation to recover from a stockholder a sum remaining due on his stock or his double statutory liability. I do not mean to say that the attitude of the defendant is the same as that of a stockholder, but that, like a stockholder, having funds in its possession for which it has not accounted, to be applied in the payment of the insolvent corporation's debts, it may not defeat judgments determining the amount of the corporate indebtedness unless it be on one of the three grounds above mentioned. See also the principle stated in the second paragraph of the syllabus in Slagle v. Entrekin, 44 Ohio St., 637, and in Hubbard v. Elder, 43 Ohio St., 380.

A form of decree was submitted at the last hearing to be filed in its existing or in a modified form at the time the court con-
123 cluded its consideration of the case. The findings of fact and the conclusions drawn from them are fully stated in the opinions and it is not believed that a further and an extended specific finding such as is embodied in the form tendered is necessary or contemplated by Equity Rule 71, although such extended finding of fact appears to be permissible. The case being in equity, an appeal will in any event take up the whole record and the Appellate Court will exercise an independent judgment in interpreting it. A decree preserving the rights of the parties to appeal is delivered to the Clerk, with the direction to journalize it.

Decree.

(Entered by Judge Sater May 1, 1916.)

This cause came on to be heard at this April term on the pleadings, evidence and exhibits, and was argued by counsel and submitted to the court; and on consideration the court do find on the issues joined in favor of the plaintiff, and that the defendant ought to account to plaintiff for the sum of eighteen thousand fifty-five and 33/100 ($18,055.33) dollars with interest thereon from the first day of May, 1909, at the rate of six per cent. per annum, which said sum, with interest thereon as aforesaid until the first day of the present term, to-wit, April 3, 1916, amounts to twenty-five thousand five hundred fifty-seven and 31/100 ($25,557.31) dollars.

It is therefore ordered, considered, adjudged and decreed that the defendant account to plaintiff for and that the plaintiff recover from the defendant the said sum of $25,557.31, and his costs herein expended, taxed at $—, the plaintiff being entitled also to interest on said sum from said 3d day of April, 1916. To all of which findings and conclusions and to which order, judgment and decree each of the parties hereto excepts; and at the same time came the
124 plaintiff and gave notice of his intention to appeal this cause to the Circuit Court of Appeals of the Sixth Judicial Circuit,

and also at the same time in like manner came the defendant and gave notice of its intention to appeal this cause to the said Circuit Court of Appeals.

Motion to Transfer Cause.

(Filed July 3, 1916.)

Now comes The Second National Bank of Cincinnati, Ohio, defendant herein, and moves the court to transfer the above entitled case to the law docket of the court and to submit the issues herein to a jury on the ground that all of the evidence submitted herein shows that the complainant's cause of action, if any, is legal and not equitable.

J. B. FORAKER,
CHARLES M. LESLIE,
FERDINAND JELKE, JR.,
J. SAGMEISTER,
Solicitors for the Defendant, The Second National Bank of Cincinnati, Ohio.

125 *Entry Overruling Motion to Transfer Cause.*

(Entered by Judge Sater July 3, 1916.)

This cause coming on this day to be heard on the defendant's motion to transfer the cause to the law docket and to submit the issues to a jury, was argued by counsel and the court being fully advised in the premises does overrule the said motion, to all of which the defendant, by its counsel, duly excepts.

Petition for Leave to File Amendment to Answer to Amended Bill of Complaint.

(Filed by Leave of Judge Sater July 3, 1916.)

Now comes The Second National Bank of Cincinnati, Ohio, defendant in the above entitled cause, and prays the Court for leave to file an amendment to its answer to the amended bill of complaint herein, to furtherance of justice and in order to conform its answer to said amended bill of complaint to the facts already proven of record.

J. B. FORAKER,
CHARLES M. LESLIE,
FERDINAND JELKE, JR.,
J. SAGMEISTER,
Solicitors for the Defendant, The Second National Bank of Cincinnati, Ohio.

126 *Assignments of Error.*

(Filed July 8, 1916.)

Comes the plaintiff in this cause, W. C. Sterrett, as Receiver of the Alabama Trust & Savings Company, and prays for and makes an appeal to the United States Circuit Court of Appeals for the Sixth Circuit from the final decree of the United States District Court for the Southern District of Ohio, Western Division, which was entered on the 1st day of May, 1916, and says there is error in the said decree of injury to him and makes and assigns the following several assignments of error upon which he will rely, to-wit:

Assignments of Error.

1. The said District Court erred in said decree to the injury of the said plaintiff.

2. The said District Court erred in said decree to the injury of the said plaintiff in that it decreed that the plaintiff recover from the defendant the sum of Twenty-five Thousand Five Hundred and Fifty-seven Dollars and Thirty-one cents ($25,557.31), with interest from the third day of April, 1916, with the amount of costs taxed, when the said decree in favor of the plaintiff should have been for a very much larger sum.

3. The said District Court in said decree erred in that it was decreed therein that the plaintiff recover from the defendant only the sum of Twenty-five Thousand Five Hundred and Fifty-seven Dollars and Thirty-one cents ($25,557.31) with interest thereon from the third day of April, 1916, with the amount of costs taxed; whereas the said court in said decree should have decreed that the plaintiff recover from the defendant a sum of money equal to the aggregate amount of the following sums and interest, to-wit:

Fifty Thousand, Seven Hundred and Seventeen and 19/100 Dollars ($50,717.19), with interest thereon from, to-wit, May 1, 1909 (being $72,557.19) less Gallilean Fishermen item of $21,840.00);

Sixty Thousand, Thirty-eight and 05/100 Dollars ($60,038.05), with interest thereon from, to-wit, June 1, 1909;

Seventeen Thousand, Six Hundred and Fifty-five and 33/100 Dollars ($17,655.33), with interest thereon from, to-wit, July 1, 1909;

Thirty-six Thousand, Eight Hundred and Twenty-seven and no/100 Dollars ($36,827.00), with interest thereon from, to-wit, September 1, 1909;

Besides the cost of suit.

127 4. The said District Court in said decree, wherein it limited the recovery of the plaintiff from the defendant to the sum of Twenty-five Thousand, Five Hundred and Fifty-seven Dollars and Thirty-one cents ($25,557.31) with interest thereon from the third day of April, 1916, besides costs, erred in that, in order so to limit the recovery, the said District Court considered as material and relevant immaterial and irrelevant testimony, and but for such

error would have entered a decree for the plaintiff for the sums specified in assignment of error 3 supra.

5. The said District Court in said decree, wherein it limited the recovery of the plaintiff from the defendant to the sum of Twenty-five Thousand, Five Hundred and Fifty-seven Dollars and Thirty-one cents ($25,557.31) with interest thereon from the third day of April, 1916, besides costs of suit, erred in that, upon the material issues and the testimony and the agreements of parties in reference thereto and in connection therewith, the said District Court should have rendered a decree in favor of the plaintiff and against the defendant for a sum of money equal to the aggregate amounts of the sums and interest particularly set forth and specified in assignment of error 3 supra, to-wit, One Hundred Forty-three Thousand, Three Hundred and Ninety-seven Dollars and Fifty-three cents ($143,397.53) with interest, as aforesaid.

6. The said District Court erred in said decree in that it did not grant the plaintiff's motion, which was filed in said cause on the 9th day of July, 1914, to strike out as insufficient those portions of defendant's answer to the amended bill which were in said motion particularly specified.

Wherefore, the said plaintiff prays that this, his appeal to the United States Circuit Court of Appeals for the Sixth Circuit be allowed and that upon the hearing thereof the said United States Circuit Court of Appeals reverse and set aside the said final decree of the said United States District Court for the Southern District of Ohio, Western Division, and render a decree in favor of the said plaintiff, this appellant, for such an amount as should have been rendered in his favor and against the defendant by the said United States District Court for the Southern District of Ohio, Western Division; or that the said United States Circuit Court of Appeals for the Sixth Circuit reverse said decree of said District Court and render a decree and issue a mandate thereon directing the said United States District
128 Court to enter a decree in favor of the plaintiff and against the defendant for such larger sum as the said Circuit Court of Appeals determines from the record that the said plaintiff, this appellant, should recover in said suit.

E. H. DRYER AND
PHILIP & S. C. ROETTINGER,
Attorneys for Plaintiff, the Appellant.

Petition for Allowance of Appeal.

(Filed July 8, 1916.)

To the Honorable John E. Sater, District Judge:

The above named W. C. Sterrett, as receiver of The Alabama Trust & Savings Company, feeling aggrieved by the decree rendered and entered in the above entitled cause on the first day of May, 1916, does hereby appeal from said decree to the Circuit Court of Appeals for the Sixth Circuit of the United States, for the reasons set forth in the assignment of errors filed herewith. And he prays that his appeal

be allowed and citation be issued as provided by law, and that a transcript of the record proceedings and document upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Sixth Circuit of the United States, sitting at Cincinnati, Ohio, under the rules of such court in such cases made and provided.

And the petitioner further prays that the proper order relating to the security required of him be made.

E. H. DRYER AND
PHILIP & S. C. ROETTINGER,
Attorneys for the Appellant.

129 *Entry Overruling Petition for Leave to File Amendment to Answer to Amended Bill of Complaint.*

(Entered by Judge Sater September 28, 1916.)

This cause came on further to be heard at this term upon the defendant's petition for leave to file an amendment to its answer in the amended bill of complaint and was argued by counsel and thereupon upon consideration thereof the Court overrules the prayer of said defendant's petition and denies to defendant leave to file its amendment to the amended bill of complaint, to all of which defendant by its counsel duly excepts.

Entry Directing Clerk to Enter Statement of Evidence.

(Entered by Judge Sater September 30, 1916.)

This day came the plaintiff herein and presented to the Court the statement of evidence, and it appearing that due notice has been given to counsel for the defendant, appellee, of the filing of said statement, and no objections appearing, the same is hereby approved and the Clerk is directed to enter said statement of evidence as of record according to the rules in such cases made and provided.

130 *Statement of the Evidence by the Plaintiff, Appellant.*

(Lodged with Clerk August 15, 1916, and Filed September 30, 1916.)

W. C. STERRETT, on direct examination:

My name is W. C. Sterrett; residence, Birmingham, Ala.; Cashier of the Jefferson County Savings Bank. I am the plaintiff in this case, and was appointed as Receiver of the Alabama Trust and Savings Co. by the Chancery Court of Jefferson County, Alabama on the 27th day of April, 1911, and as such receiver I was ordered to take possession of the books and assets of the Alabama Trust & Savings Co.

As such Receiver I frequently searched the records, three times

for the books of the Company, and called upon Mr. Garber, who was the attorney of the Receiver of the City Bank & Trust Co. for any books of the Alabama Trust & Savings Company which might be in his possession.

The minute book of the Alabama Trust & Savings Company was not among the papers delivered to me under the court. Neither have I been able thus far to find the general ledger of the Alabama Trust & Savings Company.

Mr. E. D. Smith is the Receiver of the Alabama Savings & Trust Company, and Mr. Garber is his attorney.

Cross-examination:

I took possession of all the books of the Alabama Trust & Savings Company that I could find and I did not find the stock certificate book, the stock ledger, the minute book, the individual ledger or the general ledger.

I had no connection whatever with the Alabama Trust & Savings Company or the City Bank & Trust Company.

The Alabama Trust & Savings Company went out of existence and was succeeded by the City Banking & Trust Company which had possession of the Alabama Trust & Savings Company's assets.

I know nothing about a written agreement between the Alabama Trust & Savings Company and the City Bank & Trust Company, nor about an agreement between the City Bank & Trust Company and The Second National Bank. I do not know the terms upon which the City Bank got the assets of the Alabama Trust & Savings Company, and according to my understanding the transfer was a voluntary one.

131 Mr. Worthington of Chicago was the President of the City Bank and Trust Company and Gus T. Brannon was connected with it at one time. Ben T. Head was a director of the Alabama Trust & Savings Company, but I do not know what position he occupied. He and Brannon were both directors.

I do not know who is running the Interstate Securities Company.

Redirect examination:

When I said that the Alabama Trust & Savings Company went out of existence, I meant that it ceased doing busines- as a bank.

Witness Ector H. Smith, sworn, testified.

Direct examination:

My name is Ector H. Smith; residence, Birmingham, Ala.; age 40 years; business, stocks and bonds. I was a stockholder, director and vice-president of the Alabama Trust & Savings Company. I bought some stock from Ben T. Head, together with Mr. August T. Brannon, about December, 1908, as near as I can remember.

We bought the entire capital stock from him with the exception of one share, and the capital stock amounted to One Hundred Thousand Dollars.

Brannon was elected President and I was elected Vice-President, and both of us were directors. The remaining directors were Tom Stobert, Enos R. Stewart and J. E. Shelby.

Brannon and I held each $15,000 of the stock and the remainder was sold out to different parties: Enos R. Stewart, $15,000; Tom Stobert, $10,000; W. K. Smith, $7,500; J. R. Lewis, $5,000; J. E. Shelby, I think, $1,000; and the Interstate Securities Company about $10,000.

Being Vice-President of the Bank, I gave the bank my entire time, and my principal duties were to look after the maturing and renewal of loans, and I had charge of the bookkeepers and other employees and more particularly the country banks, or the branch banks, end of it. I so continued until September 25, 1909.

Gus T. Brannon was President; Tom Stobert was Cashier; J. R. Lewis, Assistant Secretary.

At the beginning, I had nothing to do with the connection at Cincinnati. That was arranged by Mr. Head. When we purchased Mr. Head's interest, we assumed the payment of Mr. Head's obligations in the Second National Bank which at that time was $100,000.

132 Some time after that we executed our paper—that is, Mr. Brannon and I, to the Second National Bank. Then afterwards sold it out to the parties above mentioned, taking their notes for the same, which were pledged to the Second National Bank, taking down Mr. Head's note and our original note.

It was either the latter part of 1908 or the early part of 1909, though my recollection is that it was the latter part of 1908 that we assumed the obligations of Mr. Head to the Second National Bank. The obligation to the Second National Bank was an individual indebtedness of Mr. Head, and according to my recollection, Mr. Brannon and I gave our note to the Second National Bank originally for the amount of the debt. Mr. Head pledged the entire issue of the $100,000 of the capital stock of the Alabama Trust & Savings Company to the Second National Bank of Cincinnati and that stock was issued to the respective parties who came in for their respective amounts, and was pledged to the Second National Bank for the amount of their notes.

When these other gentlemen came in, each individual issued his note with the stock attached as collateral and pledged with the Second National Bank as security. The original stock pledged to the Second National was surrendered by the Bank.

Some time in May, I think about May first, 1909, Mr. E. E. Galbreath, Vice-President of the Second National Bank, came to Birmingham and requested Mr. Brannon to arrange to give the Bank's obligations for the amounts represented by each individual note which the Second National Bank held, payable to themselves and endorsed by the respective makers of these notes and let it be a Bank obligation, assuring Mr. Brannon that the same would be treated as an individual obligation.

Mr. Galbreath said that his directors had been criticizing him about the way the loans were carried and that he wanted them carried in this shape in order to avoid criticism.

I told Mr. Galbreath that I would not agree to it, but upon his

promise that he would so treat it as an individual transaction, and only wanted to use it for his own convenience, if it was any assistance to him I would do so.

After Mr. Galbreath's visit, the notes were made, signed Alabama Trust & Savings Company, by Gus T. Brannon, President, in favor of themselves, and each note endorsed by the makers of the original notes. These notes were taken back by Mr. Galbreath and they were executed right there in the office when he asked for them.

The last time I saw the notes, Mr. Galbreath took them away with him. The collateral was retained by the Bank at Cincinnati and I do not know what became of the notes which the Second National Bank held prior to this time and in lieu of which the new notes were made by the Alabama Trust & Savings Co.

The only note I ever remember of seeing after executing them was the Head note when it was returned to us for delivery to Mr. Head. If the other notes were returned to Mr. Brannon, I do not know what disposition he made of them.

Mr. Brannon lives at Chicago at this time.

After the notes were executed, Mr. Galbreath had Mr. Brannon give him some bills receivable of the bank as collateral. Mr. Brannon put it up to his Board of Directors and they refused to authorize him to do so.

All the books of the Alabama Trust & Savings Company including the minute book, were taken over to the City Bank at the time the two banks were merged or the agreement which they entered into. Since then I have not seen any of them, unless it was in court or some place like that.

The Board of Directors of the Alabama Trust & Savings Company refused to ratify these notes which we gave to Mr. Galbreath as an obligation of the Bank or to authorize Mr. Brannon to pledge any collateral of the Bank for the same, and we told Mr. Galbreath of the action of the Board.

I kept a record of the collateral which was turned over to the Second National Bank and have it with me today.

I listed the number of the note and the maker and the collateral dates of maturity and amount and where it was sent and for what purpose it was held as collateral, and I have that book before me, the same being in my handwriting, and I can give a list of the collateral which was given to the Second National Bank in connection with the issue of these new notes of the Alabama Trust & Savings Company. I kept this book for the purpose of keeping track of the collateral of the Bank.

"Q. Will you now please turn to your book, Mr. Smith, and give us a list of the collateral which was turned over to Mr. Galbreath for the Second National Bank at the time these notes by the Alabama Trust & Savings Company were executed?"

(The answer is identical in words, figures and tabulation with Exhibit 4 to the Amended Bill of Complaint filed June 10, 1914, this printed record, page 39.)

134 This is the collateral to which I referred when I stated the Board of Directors refused to either authorize or ratify the transfer of collateral to the Second National Bank.

"Q. Mr. Smith, it is shown in the pleadings, and admitted, that some time in the summer of 1909, or before, the Alabama Trust & Savings Company owed the Second National Bank of Cincinnati, Ohio, $28,000.00; do you remember that fact?

"A. Yes sir.

"Q. You may state whether or not there was collateral delivered or transferred to the Second National Bank of Cincinnati, Ohio, to secure that indebtedness of $28,000.00 by the Alabama Trust & Savings Company?

"A. Yes sir.

"Q. Does the book which you have before you contain a list of the collateral that was so transferred to secure this indebtedness?

"A. Yes sir, it does.

"Q. Will you please give us from your book a list of this collateral so transferred?"

(The answer is identical in words, figures and tabulation with Exhibit 5 to the Amended Bill of Complaint filed June 10, 1914, this printed record, page 12.)

At the time the different notes were made in the name of the Bank by Mr. Brannon and turned over to Mr. Galbreath, the Second National Bank of Cincinnati had on deposit of the Alabama Trust and Savings Company about $18,000.

At the time the Alabama Trust & Savings Company checked on this balance and the checks were turned down by the Second National Bank of Cincinnati, they applying it on two or three notes which were given to Mr. Galbreath at the time of his visit to Birmingham. No one that I know of authorized this application, and I wrote them a letter in which I protested, and our bookkeeper was instructed not to reconcile statements as they sent them out, but we received no reply from the Second National Bank and they refused to honor our checks against that fund, or restore that money, so long as the Alabama Trust & Savings Company continued to do business with the bank.

I had a general knowledge, but no specific knowledge, of the value of the collateral turned over to the Second National Bank, as I have already answered.

"Q. From the general knowledge that you had of these parties, and this collateral, and your acquaintance with it in making re-
135 newals, what do you say was the character of the collateral transferred to the Second National Bank of Cincinnati?

"A. I would say the greater part was good."

The Second National Bank had some collateral which was pledged for a loan that was made for the Citizens Savings Bank of Birmingham, which they assumed for an indebtedness of about $25,000.

I have a statement from the Second National Bank giving a list of the total collateral which they held up to 9-4-09, I mean September 4, 1909.

"Q. Will you produce that statement, and have it annexed as a part of your testimony?"

(On objection this question was not answered.)

"Q. Mr. Smith, are you able to say whether or not this list which ou say was furnished you by the Second National Bank, now arked Exhibit 1, is a correct statement of the collateral held by hem at that time?

"A. It is a statement they sent me at my request, giving a list of ll the collateral they held belonging to the Alabama Trust & Sav- ngs Company, and the amount due them by said Bank."

I checked it up with my book and found it to be correct.

The following is Exhibit 1 of this testimony concerning which I ave just testified above.

Copy.

EXHIBIT NO. 1 TO DEPOSITION OF ECTOR H. SMITH.

A prompt report on this Statement of Account is requested. If ot advised to the contrary within one month after receipt, we shall nderstand that you acknowledge this Statement to be correct.

[SEAL.]

Dr.	In Account with the Second National Bank, Cin.	Cr.			
Ala. Trust.....	Ala. Coal & Ore Co.....	501.32	Paid	June	11
	W. L. Doane.....	300.00		Oct.	14
	C. W. Noye.....	150.00		Sept.	13
	Mrs. A. E. Pruen.....	24.00		June	19
	Frazer Lbr. Co.....	136.35	Paid	June	21
	Do.	199.00	Paid		21
	Do.	129.68	Paid		21
At Ala. Tr.....	B. T. Head.....	2,575.00			22
	Amer. Adv. Sales Co.....	500.00		Nov.	1
	W. L. Doane.....	500.00		Oct.	24
	Tyler Auto Co.....	1,479.50	Paid	Nov.	24
At Trader Nat....	H. C. Crane.....	200.00		July	1
	Green & Brown.....	500.00		Nov.	12
	M. R. Carlisle.....	1,800.00			1
	E. R. Stewart.....	4,320.00		Oct.	13
	Frazier Lbr. Co.....	174.25	Paid	July	21
	Do.	194.84			21
	Do.	181.83	Paid		21
	J. E. Ellis.....	300.00		Sept.	15
	W. E. Nichols.....	150.00		July	19
	J. E. Bennett.....	425.00		Oct.	21
	S. Hall	800.00		July	25
	A. E. Smith.....	2,250.00		Oct.	24
	W. C. Garrett.....	125.00		July	26
At Trader Nat....	J. P. Lawrence.....	150.00			26
	B. F. Nichols.....	105.00		Nov.	4
	F. H. Hopkins.....	100.00		Oct.	30
	G. N. O. of G.....	21,840.00		Aug.	5
	J. T. Gauden.....	150.00		Oct.	6
At Ala. Tr.....	Grau & Bodeker.....	100.00	Paid	Aug.	11
Do.	Ala. Paper Co.....	400.00	Paid		6
At Traders Nat....	E. E. Smith.....	600.00	2nd Ave.		10
	L. P. Topher.....	4,000.00			10
	T. Cullen	200.00			15

At Ala. Tr.....	F. L. M. Mann.....	125.00	Paid	19
	S. H. Floyd.....	1,000.00	Paid Oct.	17
	J. H. Deane.....	1,000.00	Nov.	17
At Ala. Tr.....	E. M. Crawford.....	375.00	Aug.	26
	E. J. Blackwood.....	30.00		19
	G. O. Griffith.....	36.00		30
	E. W. Bell.....	100.00	Paid Sept.	1
	Shelby Peevy Co.....	500.00	Paid	1
	W. Carlisle	200.00		7
	Amer. Adv. Sales Co.....	500.00	Paid	7
	Do.	1,000.00		16
	Shelby Peevey Co.....	695.00	Paid	17
			Renewed	
	I. J. Watson.....	500.00	Paid	17
	O. A. Gourdin	150.50	50 pd.	17
	J. R. Lewis.....	350.00		19
	C. D. Ebersole.....	160.00	Paid	20
	Do.	2,000.00		21
		Ret. 1,500.00	Pd.	
	G. Riser	106.62	Childburg	27
	Slocum Fur. Co.....	300.00		30
	E. W. Bell.....	100.00	Paid Oct.	1
	F. Johnson	183.00	1 Paid	1
	C. P. Doane.....	2,000.00	Error	1
	A. A. Hurst.....	115.00	At Eden	
	Bk. of Red Bay.....	5,000.00	Nov.	1
	Burdick Co.	350.00	250.00 pd.	3
	W. Miles	200.00	At Childers-	
			burg	7
137	W. H. Chamelton.....	206.62	Paid	7
	Vincent Nuth Co.....	2,000.00	Paid	6
	D. C. Lightner.....	5,000.00		11
	G. M. Riser & Co.....	1,580	x	12
	B. L. Johnson.....	254.66	x	12
	C. H. Butler.....	350.00	x	12

In Account with the Second National Bank, Cin., Cr.

B. A. Alford.....	1,000.00	x Oct.	12
J. M. Kidd.....	1,048.84	x	26
W. D. Caspar & Co.....	1,000.00	x	27
C. H Butler.....	750.00	x Nov.	1
Bk. of Phoebe.....	3,105.00		1
Wm. Edmunds	520.00	x Ret.	1
Butt & Tote.....	205.35	x Ret.	1
E. W. Bell.....	100.00	x	1
A. A. Pierson.....	89.00	x Ret.	1
T. J. Brown.....	225.00	x	1
M. L. Heath.....	427.00	x	5
B. A. Alford.....	1,000.00	x	8
S. A. Morris.....	200.00	x	12
J. M. Kidd.....	500.00	x Ret.	12
C. H. Butler.....	600.00	x Ret.	12
A. D. Smith.....	250.00	x	12
C. V. Bamer.....	135.00	x	12
J. C. Ginn.....	108.00	x	12
T. L. Hawkins.....	100.00	x	10
Vincent Nutle Co.....	2,000.00	x Ret.	21
C. H. Butler.....	350.00	x Ret.	21
C. D. Ebersole.....	147.00		23
C. H. Butler.....	500.00	x I.	24
Mrs. R. Wood.....	500.00	x I.	24
T. E. Elliott.....	640.00	x	26

	C. H. Butler	600.00	x		29
	G M. Riser & Co.	1,040.00	x		29
	G. R. Horton	125.00	x		30
	E. W. Bell	100.00	x	Dec.	1
	J. M. Kidd	1	x		1
	J. M. Gaither	482.29	x	Dec.	1
	Mrs. R. Wood	527.78	x		1
	J. H. Gorden	162.00	x		1
	W. G. Chitwood	125.00	x		1
	J. J. Hester	400.00			
	I. J. Martin	265.00	x Ref.		2
	H. O. Law	150.00			2
	J. W. Morman L.	942.00			7
	E. M. Pinkord	500.00			7
	G. Lushy	209.00			9
	A. J. Smith	270.00	x		15
	W. Thumpr—	324.00	x		15
138	Mrs. N. E. Powers	24.00			19
	J. P. Dees	108.00	x		25
	W. O. Brown	250.00			25
	G. C. Burns	97.20	x		25
	A. A. Hurst	500.00			25
	C. H. Bowlds	5,300.00			28
	H. M. Banning	1,250.00			28
	M. L. Duff	1,000.00			28
	G. M. Jordan	108.00	x		29
	John C. Pugh	3,000.00			31
	W. E. Quinn	400.00		Jan.	1
	E. M. Harris	214.00			1
	E. W. Bell	100.00	x		1
	I. C. Schrader	536.00	x		1
	A. O. Lane	150.00			2
	B. T. Head	1,000.00			4
	E. W. Bell	100.00	x	Feb.	1
	A. O. Lane	150.00			2
	E. J. Blackwood	30.00			19
	Do.	250.00			19
	S. O. Griffiths	48.00			28
	E. W. Bell	100.00	x	Mch.	1
	A. O. Lane	150.00			2

Ctz. Sav. Bank.

At Ala. Tr.	C. D. Ebersole	80.00	Mch.	26
	"	500.00	Ap.	27
	"	244.44		27
	"	168.00	May	23
	"	600.00		23
	F. C. Cull	250.00		24
	C. Willis	250.00		24
	C. H. Butler	500.00		24
	J. M. Kidd	1,000.00		25
	H. Mayberry Pury	2,000.00		29
	Mrs. A. E. Pruen	24.00	June	19
	E. J. Blackwood	37.50	Aug.	19
	C. D. Ebersole	500.00		27
	G. O. Griffith	300.00		30
	"	48.00		30
	C. D. Ebersole	80.00	Sept.	26
	"	2,000.00		27
	"	600.00	Nov.	23
	"	189.00		23
	Mrs. A. E. Pruen	24.00	Dec.	19

	E. J. Blackwood	250.00		Feb.	19
	"	37.50			19
	S. O. Griffith	60.00			28
	C. D. Ebersole	600.00		May	22
	"	210.00			23
139	Mrs. A. E. Pruen	600.00	500	June	19
	Mrs. A. E. Pruen	24.00		June	19
	E. J. Blackwood	45.00		Aug.	19
	S. O. Griffith	300.00			30
	"	60.00			30
	E. J. Blackwood	250.00		Feb.	19-12
	"	45.00			19
	Amer. Adv. Sales	1,000.00			
	Clarke & S.	100.00		Oct.	4-69
	W. K. Wheelock	250.00	Paid		9
	Rector & Co.	172.81		Dec.	8
	Balance Dec. on N. Y. note	25,155.00			
	McLeod Lbr. Co.	155.00		June	17
	"	165.00			19
	"	145.00			19
	E. R. Stuart	300.00		Oct.	22
	A. R. Dearborn	1,000.00		Nov.	1
	J. J. White	200.00		Sept.	30
	J. S. & B. T. Head	2,050.00		July	4
	R. Rittenberg	250.00	Paid	Oct.	4
At Trader Nat....	Ala. & Ky. Coal Co.	300.00		July	16
At Ala. Tr.	Kraus & Nogus	500.00	Paid		16
	W. A. Ohmoroeth, Jr.	100.00		Oct.	1
	J. E. Bennett	300.00		July	22
At Traders	H. Peevy	500.00			23
	Int. Securities Co.	8,000.00		Jan.	23
	E. K. Stewart	2,583.00	Paid	Aug.	19
At Ala. Tr.	W. C. Hill	250.00		Aug.	19
At Ala. Tr.	C. D. Ebersole	500.00	Paid		27
"	J. J. White	200.00			30
"	E. Prince	200.00	Paid	Sept.	5
	J. P. Thomas	175.00	Paid		8
"	C. E. Lamartin	800.00	x		11
	B. A. Alford	1,000.00	x	Oct.	15
	Amer. Adv. Sale Co.	1,000.00		Nov.	1
	C. D. Ebersole	600.00			23
	W. D. Cooper & Co.	1,000.00	x		25
	C. W. Wright	125.00		Dec.	2
	C. H. Butler	500.00	x		12
	C. D. Ebersole	500.00			7
At Ala. Tr.	Cora P. Doane	2,000.00	Paid	Feb.	25
	C. W. Wright	125.00		June	
	W. W. Barbour	500.00			25
	J. D. Raiher	1,000.00			
	A. R. Dearborn	250.00			
	C. P. Cox	5,000.00			
	Balance due on Citz. Sav. Note	23,303.33			
	Total	$155,489.25			

140 "Q. Mr. Smith, I now hand you a number of exhibits filed in the suit of Kate Rowland et al. vs. Alabama Trust & Savings Company, in the Chancery Court of Birmingham, and ask you to look over these exhibits and just refresh your recollection, and then give us the names of stockholders of the Alabama Trust & Savings Company on Sept. 25th, 1909, as best you can?

"Q. After looking over these exhibits, Mr. Smith, I will ask you to state what they are?

"A. These are the stock certificates of the Alabama Trust & Savings Company, signed by Gus T. Brannon, President, and James R. Lewis, Secretary.

"Q. You may state whether or not the stock represented by these certificates was outstanding September 25, 1909?

"A. These certificates would indicate they were. That is as far as I could say on that. I don't know.

"Q. Now, refreshing your recollection from these certificates, will you please give us a list of the stockholders as far as you can as they stood September 25, 1909?

"A. The list is as follows:

Certificate No.	Name.	No. of shares.	Date.
300	C. M. T. Sawyer	1	Aug. 10, 1909
308	Miss Ella Dobbs	1	Aug. 10, 1909
307	Miss Aleanor Dobbs	1	Aug. 10, 1909
301	W. T. Chitwood	1	Aug. 10, 1909
295	J. A. Burgess	4	Aug. 11, 1909
289	J. D. Laminack	1	Aug. 5, 1909
277	W. B. Foster	1	June 22, 1909
279	J. G. Johnson	1	July 21, 1909
273	W. A. Brown	5	May 24, 1909
294	J. T. Brown	1	Aug. 11, 1909
306	E. A. McDonald	1	Aug. 10, 1909
288	J. H. Johnson	1	Aug. 5, 1909
295	A. A. Hurst	2	Aug. 5, 1909
311	Dr. W. E. Warren	1	Aug. 10, 1909
316	W. W. Barbour	4	Aug. 10, 1909
303	D. L. Baker	1	Aug. 10, 1909
260	G. M. Riser	1	Feb. 3, 1909
263	A. O. Riser, Jr., Guardian	1	Feb. 3, 1909
262	A. O. Riser, Jr., Guardian	1	Feb. 3, 1909
313	L. W. Nichols	1	Aug. 10, 1909
297	W. C. Hill	4	Aug. 10, 1909
304	Dr. H. E. Killian	1	Aug. 10, 1909
141 309	R. J. Chitwood	1	Aug. 10, 1909
305	S. F. Killian	1	Aug. 10, 1909
299	Dr. W. S. Duff	2	Aug. 10, 1909
298	Mrs. Fannie Cotman	2	Aug. 10, 1909
302	D. D. Webster	1	Aug. 10, 1909
315	Dr. W. E. Quinn	4	Aug. 10, 1909
292	E. S. Killian	1	Aug. 5, 1909
314	Dr. C. W. Wright	1	Aug. 10, 1909
312	G. R. Horton	1	Aug. 10, 1909

The stock certificate book of the Alabama Trust & Savings Company went with the merger with the City Bank & Trust Company.

"Q. Now, Mr. Smith, you may tell us, according to your recollection, independent of any of these certificates we have shown you, who were the stockholders of the Alabama Trust & Savings Company September 25, 1909?

"A. Gus T. Brannon, J. E. Shelby, Tom Stobert, Enos R. Stewart, W. K. Smith, James R. Lewis, Interstate Securities Company, Hinds Peevy, S. H. Floyd, J. H. Dean, E. H. Smith. That is all I remember.

"Q. Whatever was done, Mr. Smith, on or about September 25, 1909, between the Alabama Trust and Savings Company and the City Bank & Trust Company looking to the taking over by the latter of any of the assets of the Alabama Trust & Savings Company, you may state whether or not there was a meeting of the stockholders of the Alabama Trust & Savings Company in which that matter was taken up and acted upon?

"A. No meeting of stockholders, but the directors represented about 90 per cent. of the stock.

After we acquired the stock from the Alabama Trust & Savings Company, we paid the Second National Bank $16,000 and they released to us $16,000 of the capital stock of the Alabama Trust & Savings Company which they held as collateral, and we sold these 160 shares to different parties.

The certificates of stock of which I have testified are a part of that $16,000 or 160 shares.

There was no notice of any kind given to our stockholders of the transaction September 25, 1909, with the City Bank & Trust Company, and they had no notice of that transaction.

The only loan made by the Second National Bank of Cincinnati to the Alabama Trust & Savings Company to my knowledge was the loan of $28,000 already testified to, and that Bank, according to my recollections, never rediscounted any notes for the Alabama Trust & Savings Company.

142 "Q. Mr. Smith, you may state whether or not to your knowledge September 25, 1909, the Alabama Trust & Savings Company owed moneys to depositors and holders of certificates of deposit, and creditors generally?

"A. Yes, sir, they had creditors. About $350,000, but I am not positive about that.

"Q. I now hand you a paper which appears to be filed as claim No. 14 in the Chancery Court of Jefferson County, Kate Rowland et al., plaintiffs, versus Alabama Trust & Savings Company, No. 5583 on the dockets of the court, and ask you to state what it is, if you can?

(Defendant objected to the question because it calls for irrelevant testimony, and entered on the same ground objection to testimony relating to each and all of the following certificates of deposit, each of which was identified by the witness as being an original certificate of deposit issued by the Alabama Trust & Savings Company and as attached to the original proof of the claim of each as a creditor in said chancery suit of Kate Rowland and others vs. the Alabama Trust & Savings Company, said certificates being outstanding and owing by

the Alabama Trust & Savings Company on September 25, 1909, and each of which certificates was offered in evidence by the plaintiff in this case in connection with this witness's testimony concerning each of them.)

Depositor.	Date.	Amount due.	Rate of interest.	Date.
Tuskegee Land & Security Co.	Feb. 10/09	$5,000	4%	Jan. 1, 1911
Mack Kidd	Apl. 13/09	$ 401.75	5%	12 Mos.
Mrs. Kate Rowland	7/3/09	$ 243.70	5%	12 Mos.
Frank Matson	July 16/09	$ 30.00	5%	12 Mos.

I identify the following certificates of deposit:

"Alabama Trust and Savings Company,

No. 9.

BIRMINGHAM, ALA., Feb'y 10/09. $5,000.00.

Tuskegee Land & Security Co., has deposited in this Bank Five Thousand Dollars payable in current funds to the order of Themselves on Jan. 1/1911 on the return of this Certificate properly endorsed.

This certificate is not subject to check.

With interest at the rate of 4 per cent per annum from this date.

JAS. R. LEWIS,
Secretary & Treasurer."

143 "VINCENT, ALA., April 13, 1909. No. 2.

Mack Kidd has deposited in

Alabama Trust & Savings Company

401.75

Four Hundred One & 75/100 Dollars.

Payable to Mack Kidd or order on return of this certificate properly endorsed twelve (12) months after date with interest at Five (5) per cent per annum.

CHAS. P. WILLIS,
Mgr.

No interest after maturity.
Not subject to check."

"CHILDERSBURG, ALA., 7/3/1909. No. —.

Mrs. Kate Rowland has deposited in

Alabama Trust & Savings Co.

$243.70

Two Hundred Forty-three and 70/100 Dollars

payable to Mrs. Kate Rowland or order on return of this certificate properly endorsed twelve months after date with interest at 5% per cent per annum.

F. C. CULL,
Cashier.

No interest after maturity. Not subject to check."

"CHILDERSBURG, ALA., July 16, 1909. No. 5.

Mr. Frank Matson has deposited in

Alabama Trust & Savings Co.

$30.00

Thirty & No/100 Dollars,
payable to Frank Matson or order on return of this certificate properly endorsed 12 months after date with interest at 5% per cent per annum.

F. C. CULL,
Cashier.

No interest after maturity.
Not subject to check."

I have before me a combination General Ledger and Balance Book of the Alabama Trust & Savings Company covering the period from May 31, 1909, to September 25, 1909. This book shows the condition of the Bank on September 25, 1909, both debits and credits, and during the period from May 31, 1909, to September 25, 1909.

I have before me the page of this book which shows the condition of the Alabama Trust & Savings Company September 25, 1909.

144 (Plaintiff offered said page in evidence, the same marked Exhibit 2 as a part of Mr. Smith's testimony.)

(This Exhibit 2 is the original balance sheet of the Alabama Trust & Savings Company on September 25, 1909, showing liabilities, including $100,000 capital stock, of $460,907.41) of which a tabulation is as follows:

Liabilities.

Capital Stock	$100,000.00	
Savings, Certificates of Deposit and General Deposit	269,347.14	
General Bills Receivable	51,159.42	
Bank, other than its branches	24,742.01	
Its branch banks	3,313.57	
Discount and Interest	12,345.27	460,907.41

Assets.

Cash	3,369.84	
Exchange	988.67	
Stationery	1,828.27	
Rents	1,830.50	
Good Will	9,000.00	
Stocks & Bonds	45,500.00	
Furniture and Fixtures	9,184.84	
Current expenses	16,756.10	
Loans and Discounts, General	267,289.40	
Owing by Banks, exclusive of Branch Banks	59,065.47	
Its Branch Banks	46,094.32	460,907.41

Cross-examination:

I became connected with the Alabama Trust & Savings Company about January 1, 1909. This was after Mr. Head had bought stock which was then with the Second National Bank at Cincinnati, as I understood they were holding the stock as collateral for Head's note. I do not know anything about the manner in which he procured the loan. I do not know what Head did with the money, but I understood he paid it to Mr. Cullom who owned the Bank. I do not know whether Head brought any money back to Birmingham from that loan and I did not see the books of the Alabama Trust & Savings Company at that time. I saw them afterwards and they did not show anything as to Head's account.

The Bank showed a capital of one hundred thousand dollars paid up, which had been paid originally by Mr. Cullom, and Head bought his stock.

I do not know where the stock book is, I never saw it, but I did see some of the books afterwards in the City Bank, among them some of the letterbooks.

145 E. D. Smith is Receiver of the Guaranty Bank to which name the City Bank changed its name.

I became Vice-President of the City Bank. I went there on September 27, and *staid* about three weeks, and left on October 15, 1910 (1909) and had nothing to do with the Bank afterwards.

I was never a Director of the City Bank, but was a director of the Alabama Trust & Savings Company as well as Vice-President. Mr. Head was connected with the City Bank and I think was Vice-President at the time.

Some time early in the year 1909, Brannon and I substituted our note for Head's note which he had given to the Second National Bank of Cincinnati in connection with the pledge of stock. It must have been about February, 1909. Head bought the Bank (Alabama Trust & Savings Co.) in the Fall of 1908, but the exact time I do not remember.

I do not remember just exactly how long our notes remained in the Second National Bank until we could change for different notes when we sold stock to other parties. Our note was given, not to the Alabama Trust and Savings Company, but to the Second National Bank, and I am sure of that. I think it was two or three months when the change was made from our notes to the notes of the other parties.

J. E. Shelby was a director of the Alabama Trust & Savings Company but held no office. He bought his stock from us, but did not give a note, and we remitted the money to the Second National Bank and they sent the stock down and we gave it to him. That was a part of the $16,000.

Enos R. Stewart was a director of the Alabama Trust & Savings Company, and manager of the Interstate Securities Co. Mr. Brannon was President of the Interstate Securities Company.

With the exception of W. K. Smith, all of those who gave their notes to the Second National Bank were officers and directors of the Alabama Trust & Savings Company, also excepting Interstate Securities Company which was managed by Mr. Brannon.

These notes were originally payable to the Second National Bank

and they were not payable to the Alabama Trust & Savings Company.

"Q. I will read you a copy of a letter which I have here and see if it will refresh your recollection:

146 "Letter Head.

Alabama Trust & Savings Company.

BIRMINGHAM, ALA., Jan. 19, 1909.

Mr. G. W. Williams, Cashier, Cincinnati.

DEAR MR. WILLIAMS: I am sending you notes as follows:

Gus T. Brannon, balance 6,500	$7,300
Tom Stobert	10,000
W. K. Smith	10,000
James R. Lewis	5,000
Interstate Securities Company $24,200	25,000
Ector H. Smith	15,000
Gus T. Brannon (Collateral)	15,000
	$87,300

I am sending this as per our conversation of yesterday. You are at liberty to charge any or all of these notes to us at any time.

Yours very truly,

GUS. T. BRANNON."

"Does that refresh your memory?

"A. I could not tell you."

"Q. I have here a letter dated October 10, 1908 and signed by your name. Were you in the Bank then?

"A. I probably was if I signed it then.

"Q. Then I will read you this:

"Alabama Trust & Savings Company.

BIRMINGHAM, ALA., Oct. 10, 1908.

At a meeting of the directors of the Alabama Trust & Savings Company held this day at which all the directors of said Company were present, the following resolutions were adopted:

Whereas, Ben T. Head of Birmingham, Alabama, has negotiated a loan for one hundred thousand dollars from the Second National Bank of Cincinnati, Ohio, and has attached to his note four certificates, 209, 210, 211 and 212, amounting to one thousand shares of stock in the Alabama Trust & Savings Company, and Whereas, to secure the Second National Bank of Cincinnati from any loss on said note.

Be It Resolved that permission is hereby given to Second National Bank of Cincinnati to charge said note, or any part of it, to the account of the Alabama Trust & Savings Company, now a depositor in

the Second National Bank of Cincinnati, upon three days' notice to the Alabama Trust & Savings Company.

147 I do hereby certify that the above is a correct copy of a resolution passed at a meeting of the directors of the Alabama Trust & Savings Company, held this 10th day of October, 1908.

(Signed) BEN T. HEAD,
President.
ECTOR H. SMITH,
Secretary Pro Tem."

"Do you remember that?

"A. If I signed it.

"Q. You have no recollection of it?

"A. I was not an officer of the bank at that time. I may have acted for them."

I think it was some time in May, 1909, when there was a change made in the seven notes given. The first two were given in January as a substitute for Head's and I think prior to May, the first seven notes were given, and that some time in May the notes of the Alabama Trust & Savings Company were substituted for these and were signed by Gus T. Brannon, President, and each individual endorsed his own note.

We gave these notes because Mr. Galbreath said it would put him in a better position with his Board of Directors.

"Q. Was the Alabama Trust & Savings Company insolvent on the 25th of September, 1909?

"A. When the Second National Bank of Cincinnati made that charge against their account they were under the reserve required by law.

"Q. I understood you to say that they had three hundred and fifty thousand dollars of outstanding indebtedness about that time?

"A. Yes sir.

"Q. How much money did they have, actual money?

"A. About fifty-three thousand dollars.

"Q. Was that money in the vaults or was that money outstanding and owing to them?

"A. This was money in the vaults and in corresponding banks subject to check.

"Q. Counting the seventeen thousand dollars in Cincinnati?

"A. Yes sir.

"Q. How much would it be without that?

"A. Thirty-five thousand.

"Q. At the time you transferred the whole thing over to the City Bank; is that it?

"A. Yes sir.

"Q. Did you do that because you were insolvent?

"A. No, sir.

"Q. Why did you do it?

148 "A. Well, that is a long story. I can tell you if you want me to.

"Q. I am not after a long story. Were not the real facts you were insolvent and you knew you had to go into the hands of a receiver or make an assignment?

"A. No, sir. The real facts in the case was because the City Bank & Trust Company attempted to blackmail us.

"Q. The City Bank & Trust Company claimed you owed them, didn't they?

"A. No, sir, they borrowed money from us every day or two.

"Q. Then, according to your statement, they were a bad lot at that time; they were trying to blackmail you and borrow money and all those sort of things?

"A. I don't think it would be hard to prove that if necessary.

"Q. And yet you turned over all the assets of the Alabama Trust & Savings Company to them?

"A. We did that because we felt an interest in the depositors.

"Q. You were going to turn them over to this tough lot as guardians and protectors?

"A. No, sir, we were going to shove the responsibility, if they wanted it.

"Q. And you immediately became an officer in that concern?

"A. I went over."

About a year after that the City Bank went into the hands of a Receiver. There was no provision made for the creditors of the Alabama Trust & Savings Company except that the City Bank would assume same.

I never paid anything on my note to the Second National Bank and I do not think any of the others paid anything.

When we went over to the City Bank, I was the only one who went over as an officer. Mr. Lewis went as paying teller and J. E. Shelby became a director. Mr. Stobert came there afterwards—probably two or three weeks after the merger, but not as an officer. The Guarantee Bank was the City Bank & Trust Company with its name changed.

Redirect examination:

One Hundred Thousand Dollars furnished the Second National Bank was furnished to Ben T. Head to purchase the stock of the Alabama Trust & Savings Company. None of that hundred thousand dollars went to the Alabama Trust & Savings Company, and
149 as far as my knowledge goes, the records of the Bank do not show the receipt of any part of this money.

The Alabama Trust & Savings Company frequently drew checks against the deposit which it had in the Second National Bank, but to my knowledge none of the balance in the Second National Bank was ever made up of any part of the hundred thousand dollars used for the purchase of the capital stock of the Alabama Company.

When the Alabama Trust & Savings Company was transferred to the City Bank & Trust Company, there was a paper writing showing that transaction, but I do not know what became of the original, but this is a copy before me.

(Plaintiff offers this copy in evidence, which is the same as Exhibit 6 to the Bill of Complaint as amended and filed June 10, 1914, page — of this record.)

"$10,000 C. of D. 6 and 12 months at 4 per cent." means Certificate of Deposit payable in six and twelve months and that $10,000 was to go to Mr. Stewart, Mr. Brannon and myself.

Witness E. D. SMITH testified as follows:

Direct examination:

My name is Edward D. Smith. Am an attorney at law residing at Birmingham, Ala., and was appointed Receiver of the Guarantee Bank & Trust Company, formerly called the City Bank & Trust Company, in proceedings in chancery known as Alex W. Garber, Attorney-General, vs. Guarantee Bank & Trust Company. As such Receiver I took charge of all the assets, books, accounts and papers of that bank. I can not be absolutely definite as to whether or not as such Receiver I took over any books that formerly belonged to the Alabama Trust & Savings Company, but my recollection is that I had a box of books supposed to belong to that institution and when there was a special receivership applied for and granted, an order of court was given commanding me in some form to surrender to that receiver any books, papers or assets belonging to the Alabama Trust & Savings Company. J. B. Garber, Attorney, and C. H. Abbott as expert accountant, were helping me to administer the trust as receiver of the Guaranty Bank. The actual physical control over the books most of the time was in Mr. Garber, and I gave directions at the time I can not now exactly recall, to Mr. Garber and Mr. Abbott, to
150 get up the books supposed to belong to the Alabama Company, and they reported to me that they had done that. I did not personally supervise it.

W. C. Sterrett, who is cashier of the Jefferson County Savings Bank, is Receiver of the Alabama Company. I do not know him personally, but to the best of my knowledge and belief all books of the Alabama Company which came into my hands in the manner I have stated were turned over to him. I have no such books in my possession or control at the present time.

Cross-examination:

Such books of the Alabama Trust & Savings Company as I have had were in the actual possession of Mr. Garber. I am not sure he turned them over to Mr. Sterrett, but Mr. Sterrett received all they reported they had. I do not know what the books were.

My recollection is that there were a lot of miscellaneous papers in an old box or something of that sort, supposed to belong to that Company. I do not know that I personally went through all the documents, but I do remember I went through, while we still had those books and assets of the Guarantee Bank in the place where they did business. We went through the papers while we still had those books and assets of the Guarantee Bank. I spent all day for about a month or six weeks there looking over various things, and for almost three months I was in there for at least half a day, and we tried to sort the books and papers as well as we could, and came to the conclusion that these papers did not belong to us.

"Q. As I recollect Mr. Sterrett, he practically testified that he got very little in the way of books; he did not get any letters; has not the general ledgers, or individual ledgers, or stock books, nor the letter

books, nor the minute book, or any book that seems to be of any importance to anybody.

"A. I expect that is true, Judge. I found that all of the stock books—I will not say stock books, but all the meetings of the directors and stockholders of the old Citizens Savings Bank & Trust Company which I looked for especially to find some particular things—made a diligent search for them, and some of the records of the City Bank & Trust Company appeared to be fragmentary. My recollection of it is now, since I come to think about it, that the account, for instance, of the Citizens Savings Bank had been transferred on the books that were the City Bank & Trust Company's books; in other words they did not have the old original books, but they may have had some of them.

151 Redirect examination:

I do not remember to have ever seen any minute book of the Alabama Trust & Savings Company.

Recross-examination:

Nor a stock certificate book, nor letter book. I did not analyze any of those papers. They were simply an old miscellaneous collection of papers in a box and made no particular impression on me.

Witness E. N. CULLOM testified as follows:

Direct examination:

My name is Edward N. Cullom; I reside in Birmingham, Alabama, and am engaged in no business. I was President of the Alabama Trust & Savings Company from '91 up to my sale of the stock to Mr. Head and his associates.

I owned something over ninety per cent. of the stock, becoming a subscriber in '91 to $25,000, after which stock was bought and sold, and up to the time of my transfer to Head and associates, I owned about $90,000, but how long I held that before selling to Head, I can not remember.

I sold the stock to Head September 31, 1908, and had no connection with the Company after that time.

B. T. Head and associates paid for the stock in as many as four checks before I made the transfer to him.

The Bank was organized in 1891 with $100,000 capital stock, of which I took $25,000, and increased my holdings subsequently as I have stated.

"A. I entered into a verbal contract to deliver Mr. Head and his associates the entire capital stock of the Alabama Trust & Savings Company consisting of a thousand shares of $100.00 each, making $100,000.00, and when the time arrived for the delivery of that stock they had three, if not four, checks; one of the checks was drawn on a local Bank, the Citizens Savings Bank, for $10,000.00, and another check for about the same amount on a Kentucky Bank, and the third check for quite a large amount, eighty or ninety thousand dollars, I don't remember, on the Second National Bank of Cincinnati. I did

not make a delivery of the stock until I had ascertained whether these checks were good or not. Upon learning that the checks were good, either by sending them for collection, or getting some evidence that they were all right, I then delivered the stock physically over
152 to Mr. Head and his associates, but before making the delivery I had on the afternoon of the 31st, I had a trial balance drawn off of the Alabama Trust & Savings Company, and I then appointed Mr. Ector Smith and Mr. Brannon and Mr. Head as an auditing committee to audit that statement before I would deliver the stock, or deliver possession of the Company for the election of new officers. I think Mr. Head and Mr. Smith undertook to count the cash and examine the various deposits in Bank, but whoever may have done that, it disclosed that there was $157,000.00 in cash in the hands of the Alabama Trust & Savings Company, either in cash or in bank. They O K'd the statement that it was a true and correct statement. That statement showed in assets that we had $157,000.00 in cash, in round figures, and an amount less than $100.00 in overdrafts; we had no other liabilities than the capital stock, $100,000.00, and deposits amounting to $57,000.00. In other words that statement disclosed the fact that the Company could at any time liquidate its stock and pay its liabilities and depositors, except the $100.00 overdraft, and I gave a pencil memorandum guaranteeing them that these $100.00 overdrafts would be paid. I had no further connection with the Company after that than to come in every day to see that the overdrafts were being made good. When I found that the overdrafts had been made good I was released from that guarantee, and I had no further connection with the Company. These checks were drawn either by Mr. Head, Mr. Smith or Mr. Brannon. There were three or four checks, and there was no delivery of the stock, or physical delivery of the books until I had information that those checks drawn by those three gentlemen were good. That is about the history of the transfer of the Company. I then turned over to them, of course, the entire books, and stock books, minute books, and all the paraphernalia of the office. There may have been some old books that we had occasion to hunt up missing."

During my connection with the Alabama Trust & Savings Company, the Second National Bank were entire strangers to us and probably we to them.

The credit of the Alabama Trust & Savings Company was not in any way used in connection with the checks which came to me in the purchase of the stock, as it was not a matter of the Trust Company at all.

Cross-examination:

At the time I received the check for some ninety thousand
153 dollars from Head, I did not know that he had been, or had sent to Cincinnati and made arrangements about that with the Second National Bank. He did not tell me that he had done so. There had been a delay of two or three days and I think Mr. Brannon telephoned me one evening that Mr. Head was arranging to get the money from some source. That was probably somewhere in Harrodsburg, Ky. I do not remember the name of the place, but what-

ever the place, there was a check drawn for $10,000.00. I know nothing about the large check.

I had made no agreement with the Second National Bank people to make a pledge of all the stock, or with the Alabama Trust & Savings Company, either, to guarantee the note. If I had known it I would not have gone into such a transaction. As I have stated, these checks were drawn and I had no reason to believe he had obligated the Company in which he was not a stockholder or officer. In other words, they were strangers to me. I had no other acquaintance except of about thirty or sixty days and I made no delivery of the stock until I was assured the checks were paid or that they would be. All of the checks were individual checks, and as to the delivery, I took the precaution to have them O. K. my company statement.

I went out of office as managing agent of the Alabama Trust & Savings Company as soon as the stock was delivered, which was the next morning, and did not attend any meeting of the directors or stockholders after that, and did not know that at a meeting thereafter Ben Head and the directors of the Alabama Trust & Savings Company passed a resolution guaranteeing the payment of this hundred thousand dollars to the Second National Bank of Cincinnati. The present moment is the first time I ever heard of that. I knew nothing of it and did not know that it had been promised before I got the check in payment of the stock.

Head did not explain to me how or why he came into possession of the check so large as that from the Second National Bank of Cincinnati.

ECTOR H. SMITH, a witness recalled by plaintiff, testified as follows:

Direct examination:

The book before me, which I identify as the General Ledger of the Alabama Trust & Savings Company contains the amount of the bills payable owing by that Company during the period it was kept, beginning May 31, 1909, continuing, I think until September 25, 1909.

154 Upon examination of this book, the Bills Payable owing by the Alabama Trust & Savings Company at the following dates were as follows:

May 31, 1909.....	81,353.32	June 15, 1909.....	46,214.75
July 1, 1909.....	49,781.03	July 15, 1909.....	47,225.07
Aug. 2, 1909.....	56,854.42	Aug. 16, 1909.....	54,854.42
Aug. 30, 1909.....	51,609.42	Sept. 15, 1909.....	51,359.42
Sept. 25, 1909.....	51,159.42		

During this entire period no part of the $84,000, which I testified on yesterday was represented by the individual notes to the Second National Bank of Cincinnati, appeared upon the books of the Alabama Trust & Savings Company.

This ledger was balanced daily, containing the entries I have given,

Cross-examination:

This book was kept by Charles M. Spencer, bookeeper for the Bank, and is a book of original balances charged each day by the transactions of the Bank from other books of the Bank, all of which were kept by Mr. Spencer except a few by the Cashier. Mr. Spencer was the general bookkeeper and he made the general transfers into this Ledger.

TOM STOBERT, witness for plaintiff, testified as follows:

Direct examination:

I have no business at present and reside at Birmingham, Alabama. Was formerly connected with the Alabama Trust & Savings Company, some time in the fall of 1908, at which time Gus Brannon was President and Ector H. Smith Vice-President. I do not know who, except Mr. Smith and Mr. Brannon, were directors when I started with the Bank.

I came in by purchase of $2,000 stock bought from Smith & Brannon, which I paid for. I do not know whether the money went to Smith and Brannon or to the Bank. I made payment to Mr. Smith in about October, 1908, and was then elected Cashier and Director. I do not know of any other directors at that time, nor who were afterwards directors. Stock was sold to different parties. I do not recall the time when notes were given first by me and others to the Second National Bank of Cincinnati.

"Mr. Smith told me that Mr. Galbreath—that they had made up some notes at some time and that Mr. Galbreath was down there trying to settle the matter up. In other words, he wanted to split
155 that note up, didn't want it to appear that three men were making those notes but he wanted to split it up and get it into several notes; and asked me if I would sign one of the notes or endorse it. He guaranteed me there would be no liability on my part; just merely a matter of form; that Mr. Galbreath wanted several individuals to make these notes instead of two or three."

The notes were made and we endorsed them.

I was a director of the Bank at that time, but the directors did not take any action on the matter to my knowledge. They did not assemble on it. No minutes was made of it that I know of.

I do not remember the amount of the notes, except the one I endorsed, which was for $10,000, at which time Mr. Galbreath was present in the bank at Birmingham.

As near as I can recollect, what actually occurred in the Bank, and what was said and done was as follows:

"Mr. Brannon and Mr. Galbreath and Mr. Smith were back in the President's room and they had quite a long talk back there. I don't know the nature of it. I was out in front at the receiving teller's window and Mr. Smith came back to where I was at the window and explained the matter to me, told me what Mr. Galbreath wanted and asked me if I would sign the note and I told him I would. I did not hear any of the conversation in the room."

I did not have any conversation with Galbreath.

The others endorsed the several notes respectively, which the Ala-

bama bank then made. I do not know whether they were then delivered to Mr. Galbreath.

I was not very familiar with the general condition of the Bank as to its outstanding obligations and bills payable, being receiving teller and keeping individual books, or part of them, and that took up all of my time.

I do not know that prior to that time the several obligations of these parties constituted part of the liabilities of the Bank or were considered by the Bank or recognized by the Bank as the outstandings and liabilities of itself. I did not know that there were such liabilities until Mr. Smith asked me to sign that note. I was a director at the time and had been from, say, October, 1908, until these notes were signed, and I never saw any entry on the bank books showing such to have been a liability of the Bank.

The form of notes was that of a collateral note. The Alabama Trust & Savings Company were the makers of it. I am not sure, but to the best of my recollection they were made payable to the Second National Bank of Cincinnati.

156 Cross-examination:

They were endorsed by the Alabama Trust & Savings Company and by each of us.

Redirect examination:

Each individual endorsed the note which related to his amount. I at that time owned twenty shares of the par value of two thousand dollars. My stock was not put up at all. I paid for it in cash and they delivered it to me and I have since retained the certificate.

I have looked over Exhibit No. 1 to the testimony of Ector H. Smith, which is now handed to me.

"Q. Were you acquainted with some or most of the parties named on that list, persons named on that list?

"A. Yes, sir, I am acquainted with a good many of those parties on there.

"Q. I will ask you whether or not in your opinion assuming as correct the names and amounts owing by the several parties named on that list as being to that extent and in that way debtors to the Alabama Trust & Savings Company, I will ask you what in your opinion was the value at that time of that collateral, that is September 4, 1909?

"A. Just by reading over the names there, I know a good many of these people and I would consider their notes perfectly good.

"Q. So far as you know the collateral scheduled on that list was worth par?

"A. Yes, sir, I would consider it so."

Cross-examination:

I do not know all the persons on said Exhibit 1 personally. I am speaking about those I know, which is about half of them. At that time they were good.

I do not remember having given any note subsequent to the time I have spoken of. I remember only of endorsing one at the request of Mr. Smith and Mr. Brannon to split those things up, it being my understanding at the time that the Second National Bank of Cincinnati only had the notes of Smith and Brannon. That occurred some three or four months after I had went in. I think it must have been in January or February of the next year.

ENOS R. STEWART, called for plaintiff, testified as follows:

Direct examination:

I live in Birmingham, Ala., and am engaged in the busi-
157 *ness* of coal and iron ore broker. My connection with Alabama Trust & Savings Company began by Ector H. Smith, who was then the Vice-President, asking me if I would subscribe for some stock and give my note for it. I purchased $5,000 worth of stock, gave my note therefor and was elected a member of the board of directors.

That was some time after the holidays of 1908.

My election was at the next meeting of the Board. I suppose I was notified of it about a week or ten days after I was elected. At that time my associate directors were Mr. Brannon and Mr. Smith, Stobert, W. K. Smith, J. E. Shelby and two other gentlemen.

Mr. Smith told me that the stock would be carried as long as I wanted at five per cent., and I gave my demand note for $5,000 therefor.

As for the transaction with the Second National Bank of Cincinnati until Mr. Galbreath came to Birmingham, I did not know anything in the world pertaining to the manipulations or handling of the Bank or how the money was obtained by either Smith, Brannon or Head. I did not know Mr. Head had had anything to do with that institution. And I was called from my office. Mr. Smith stated that Mr. Galbreath, of the Second National Bank, was down there, and he said to me "You are in here with us now and we would like for you to endorse a paper; Mr. Galbreath wants to take up those papers and it will make him stand better with the bank's directory."

I refer to the notes I originally endorsed for stock for $5,000 before that time, and other papers. I had agreed to take $10,000 more of stock; that gave me $15,000.

I then took up the original $5,000 paper and endorsed the note for $15,000 given by the Alabama Trust & Savings Company and endorsed by me. They still have my $5,000 note, or at least I do not know where it is. I have gone to eve-y lawyer and every Receiver, and every man from the butler up to the president, of those different institutions, to get that paper, but never got it yet. I do not know whether it ever got into the hands of the Second National Bank of Cincinnati. Mr. Smith thought it was null and void by reason of the other transactions and he promised to give me that paper.

Neither the Second National Bank of Cincinnati nor anybody claiming to represent that Bank ever indicated by letter or otherwise or made demand upon me for payment, but there is a suit pending in the courts here against me now for $15,000. Mr. Galbreath was

here when I gave the $10,000 paper. I gave the $5,000 paper to E. H. Smith and that was the last time I ever saw it or heard of it.

158 The $5,000 stock that was attached to the paper was transferred and attached to the other paper with the promise that that note would be returned to me.

At the time Mr. Galbreath was there, I did not know that there was any specific call for a meeting of the Board of Directors had been made, but Brannon, Ector H. Smith, W. K. Smith, Stobert, Stewart, Lewis and myself were present. The only other director, Mr. Shelby, was unable to come. There being a majority of the directors present, I do not know whether you would call it a meeting of the Board of Directors or a conference.

The question was called up as to whether or not the Bank authorities should be authorized to give these notes to the Second National Bank of Cincinnati. We refused to do it at a meeting or a conference in the morning, and Mr. Galbreath insisted that it was very necessary for him to have this paper made by which he could make good with his directors; that they did not like the looks of the entire transaction in its present condition, but it would meet the approval of his directors if the bank would give the note and the individuals endorse it and of course being in the position we were in, being supported and mainly backed up by an institution that we regarded as high as that, we acquiesced in the vice-president's request. We did this in the meeting or conference held by the five gentlemen that I have mentioned, Mr. Shelby being absent.

As to whether or not that was just a conversation or a formal resolution passed by the directors as such, I will say

"It was a meeting that extended pretty near the whole day; we discussed this matter and we disagreed about it and I disagreed with them about turning over,—didn't think we had a right to issue the bank's paper for this amount of money that was supposed to have been borrowed by individuals for the stock business, and it was quite a rough house there for quite a while, but after the pressure was brought to bear on me I had nothing in the world to do except to consent to this transfer that was made and change in the style and character of the note. We went into an executive meeting just before we gave these papers to Mr. Galbreath."

We did not agree in the executive meeting to give them.

"The Board first disagreed to acquiesce in that at all. That is the meeting, I do not know whether you call it a board or not: it possibly might have been termed as the board after we were all inside and all who controlled the bank were there. We did not want to

159 agree to that at all. After dinner we had another meeting along about half-past two or three o'clock and finally agreed then that we would make these notes, have the bank to make these notes and endorse them."

Cross-examination:

We endorsed the notes as individuals.

Redirect examination:

It was in the form of a resolution and Mr. Spencer wrote the resolution and put it on the minutes.

Recross-examination:

I mean the final resolution, the one in which we agreed to have the bank make the notes and we as individuals to endorse them.

Further direct examination:

Mr. Galbreath was in the Bank at the time the resolution was passed and was made acquainted before the resolution was passed, of the result of the first meeting in the morning and of the refusal of the directors to do it. He stated that that would have to be done; that he had to make this particular showing, this proper showing, a satisfactory showing with his bank, and requested us to reassemble. He *staid* there two days. The second meeting was at the request of Mr. Smith, and of Mr. Galbreath also, who was in the bank at the time.

As soon as the resolution was passed, Mr. Galbreath was made acquainted with it and Mr. Brannon wrote out these notes and we endorsed them and turned them over to Mr. Galbreath.

The certificates of stock were at that time in Cincinnati.

No stockholders' meeting relative to that transaction was ever held. And that was the only directors' meeting that I now recall that had any relation to the matter during the time I was with the Bank.

Mr. Galbreath desired that the notes we then gave were to take the place and be a substitute for our individual notes with the Second National Bank of Cincinnati. Neither any money nor anything else of value passed, except that Mr. Galbreath wanted us to put up collateral. He wanted us to make it the Bank's loan and we absolutely refused to do it. We never did agree to do it as long as I have been connected with the Bank, in any way, shape, form or fashion, and I so told Mr. Galbreath very plainly, and he got very indignant.

Nothing was said about the deposit credit of Alabama Trust & Savings Co. with the Second National Bank, nor was any authority given Mr. Galbreath to in any way divert that or to allow the bank to use it as a payment upon any item whatever.

160 At that time Mr. Brannon of his own individual responsibility gave to Mr. Galbreath quite a lot of the business paper held by the Alabama Trust & Savings Co., saying it was impossible for him to get out of it; that Galbreath threatened to close the Alabama Trust & Savings Co. if he didn't do it, and that Galbreath was in a position to do so and that there was nothing else for him to do and he did it.

This first came to my attention that afternoon after the meeting when Mr. Smith called me up and told me that and at a time when I thought Mr. Galbreath had gone back to Cincinnati.

Further cross-examination:

We had the conversation with Mr. Galbreath about the collaterals right in the office and at the time he got them.

Further direct examination:

I absolutely disapproved of turning over the collateral to Galbreath and I do not know of anybody that was authorized to give it. We had a meeting of the Board and that proposition was refused and was transmitted to Mr. Galbreath by Mr. Smith and I was with Mr. Smith when he delivered that message to Mr. Galbreath, to which Mr. Galbreath said, "Well, I can not go back with this paper." I told him if he could not go back with the paper, he had better keep the original papers he had and turn over the papers the bank had given him, to which he replied "I do not think that would be fair to my institution which was really the financial backer of this bank down here;" and went on in that strain trying to talk us out of the collateral.

At that time Mr. Smith in my presence told him very positively he would not do it. Mr. Galbreath did not to my recollection say anything about how those notes would be regarded or who would be considered the real debtor to the Second National Bank of Cincinnati.

Further cross-examination:

Mr. Galbreath was in Birmingham twice and it was on his second trip when I subscribed to the $15,000 worth of stock, and gave my note for it.

Witness CHARLES H. ABBOTT, sworn, testified as follows:

Direct examination:

My name is Charles H. Abbott; reside in Birmingham; am City Comptroller and have had a number of years' experience in accounts of various kinds, and a part of that time and experience in bank accounts especially. This experience has extended over the
161 last 25 years. I am familiar with the general methods of bank accounting, and the way they keep books and carry on their business. I audited the Books and records of the Guarantee Bank & Trust Company for the Receiver, E. D. Smith, and my reports to him are attached to his Receiver's reports as Exhibits.

"Q. Did or did not you make a thorough investigation at that time and over what period of time did such investigation extend; that is to say, did it begin with the formation of that Bank?

"A. My checking did not go back of an audit made by a public accountant, J. P. Simpson, about a year prior to the appointment of the receiver; however in going over matters pertaining to the organization and other matters shown on the minutes I read and observed the entire minutes from the organization of the City Bank & Trust Company. By that I mean to say I did not go through all the figures that were made but I did go through the figures for the last year and through the entire minutes."

"My opinion formed from checking the books, and the organization of other transaction was that the City Bank & Trust Company was never a solvent corporation"; even from the time of its organization.

As to whether or not it was hopelessly insolvent on September 2

1909, I can answer that question in a general way, but if I was called upon to prove it, it would be a difficult matter. My opinion is that it was insolvent on September 25th, 1909, and both before and subsequent to that time.

In the court of its receivership it has paid 25 per cent. dividends to that class of creditors who had not stipulated for interest, those who were preferred under Section 250 of the Constitution of Alabama and nothing has been paid upon claims bearing interest.

I had access to the books and records of the Guarantee Bank and to all the books and records of the Alabama Trust & Savings Company which had been turned over to the Receiver at that time.

"My recollection is that among those books was an old certificate of stock book, probably of the time that E. N. Cullom was the principal owner in the Alabama Trust & Savings Company, but I do not remember having seen a later book of certificates."

The last time I saw it, it was among other books of the Alabama Trust & Savings Co. in a store room rented by the Receiver of the Guarantee Bank and was turned back to him when I left his service.

There were also among those books a book which purported to
162 be a minute book of the stockholders of the Alabama Trust & Savings Company, but it contained only a few sheets and those were incomplete. It also went back into the possession of the Receiver of the Guarantee Bank. I do not remember ever having seen any other stock certificate book or minute book of the Alabama Trust & Savings Company.

Cross-examination:

I saw no letter impression books of the Alabama Trust & Savings Company, but did see several letter files that were turned back with the others.

I saw an individual ledger which is now before me, which I examined but did not check it against anything else. It consisted of a binder with some sheets in it, and I do not know whether or not it was complete.

I saw a General Ledger, and the book before me is a part of it. This package of sheets bradded together, the first one dated June 2, 1909, and the last one September 24, 1909, to which this extra sheet dated September 27th, 1909, marked Exhibit 2 to the deposition of Ector H. Smith, I identify as being turned over to me as the general cash book and ledger of the Alabama Trust & Savings Company.

Witness HENRY MORSCHHEIMER, called for plaintiff, testified as follows:

Direct examination:

Live in Birmingham, Ala. Am register in chancery court there. Have been such register eleven months, prior to which time for several years was deputy register, and during the period of time covered by the institution of the suit of Tuskegee Land & Security Company v. Alabama Trust & Savings Company et al., and during the time covered by the litigation dating from the filing of the bill of Mrs.

Kate Rowland et al. vs. Alabama Trust & Savings Company. As such deputy, and afterwards register, I acquired probably a majority of the papers. The file of papers before me is apparently all of the papers now on record in my office in the said case of Mrs. Kate Rowland. It is the original court file and the original documents attached to the respective claims filed, constitute a part of the court files as do also the several certificates of stock attached to the several respective claims of stockholders on file as original evidence, also the original certificates of deposit attached to the respective claims filed as part of the court records, none of which can be detached and used in evidence in the case of Sterrett as Receiver against the Second National Bank of Cincinnati.

163 I also have before me the file of papers which is the court file in case Tuskegee Land & Security Company vs. Alabama Trust & Savings Company. They constitute part of the records of the Chancery Court.

Attorney for Plaintiff: Subject to all legal objections as to competency and relevancy, which objections are now made by the defendant, it is admitted that there are att-ched to the several respective claims filed in the case of Mrs. Kate Rowland et al. vs. Alabama Trust & Savings Company, just identified by the Register in Chancery, Henry Morschheimer, and referred to in the testimony of Ector H. Smith, documents purporting to be such documents as were testified to by Ector H. Smith, and copies need not be set out at length.

Attorney for Defendant: I am thoroughly convinced that these documents have no relation to this case and no bearing upon the issues to be tried in it. I object to them for that reason, but I do agree that the documents are copies as aforesaid. I make this agreement simply to please my friends on the other side, and in order not to interfere with their coming night's rest.

Witness J. B. GARBER, called for plaintiff, testified as follows:

Direct examination:

My name is J. B. Garber, an attorney living and practicing in the city of Birmingham, Alabama, and as such was one of the legal representatives of E. D. Smith, as receiver of the Guarantee Bank & Trust Company.

To the best of my recollection the books of the Guarantee Bank & Trust Company, including likewise the books of the Alabama Trust & Savings Company, came into my possession as counsel for Mr. Smith, receiver. There were many such books of the Guarantee Trust Company, and the Alabama Trust & Savings Company, and of the Citizens Savings Bank, all of which were in the custody of the Guarantee Bank & Trust Company at the time the receiver of said Guarantee Bank & Trust Company was appointed, and while I did not attempt to familiarize myself with all these various books, to the best of my knowledge, the books of the Alabama Trust Company came into the possession of the receiver of the Guarantee Bank & Trust Company.

I do not recall ever having seen the minute book or stock certificate book of the Alabama Trust & Savings Company.

164 "To the best of my recollection, in April or May, 1911, a receiver was appointed for the Alabama Trust & Savings Company by the Chancery Court of Jefferson County, whose name is W. C. Sterrett; that after that receiver was appointed the Chancery Court made an order directing the receiver of the Guarantee Bank & Trust Company to turn over to the receiver of the Alabama Trust & Savings Company all the books and records of the said Alabama Trust. Upon that order the books and records then stored in a warehouse company in Birmingham, or a large part of them, were turned over by me for the receiver of the Guarantee Bank & Trust Company to W. C. Sterrett, as receiver of the Alabama Trust."

Cross-examination:

I do not recall that I ever saw any of the books of the Alabama Trust to identify them, never having had occasion to look thorugh them, Mr. Abbott doing that work.

I know nothing of the present whereabouts of the books of the Alabama Trust.

Attorney for plaintiff offers in evidence the bill in the case of Mrs. Kate Rowland vs. Alabama Trust & Savings Company, filed July 21, 1910, suit No. 5583; the amendment to the bill in the same suit, filed October 25th, 1910; the decree in the same suit, entered April 27th, 1911; the report of the receiver in the same case, filed June 8th, 1912, and an agreement of parties filed June 21st, 1912, all of these papers and pleadings being of the file identified by Mr. Morscheimer, Register of the Chancery Court, in his testimony herein; and as it can not be withdrawn from the Court file in Alabama, we ask that the stenographer make a copy in lieu of same, and number them exhibits.

Attorney for defendant: I have no objection to copies. I object to them as relevant.

(The documents here offered by the plaintiff are the same as Exhibits 7, 8, 1 and 2 to the amended bill of complaint filed June 10, 1914, this record page —.)

(The material parts of the other Exhibits thus offered are as follows:

Defendant's answer in the Kate Rowland case is in substance a denial of the allegations of first and second paragraphs of bill except that it admits that it is a banking corporation organized under the state of Alabama; as to third paragraph of bill, denies it is indebted as therein stated; denies that it has any assets or property of any kind, and denies there are any trust funds which should be marshaled or administered in that court.

Agreement filed June 21, 1912, in Cases in the Chancery
165 Court at Birmingham; Tuskegee Land & Security Co. v. Alabama Trust & Savings Co. et al., No. 5866, and W. C. Sterrett, Receiver, v. Second National Bank et al., No. 6281, for their settlement and dismissal,

That part which is material here is as follows:

"4. This settlement shall in no wise prejudice or affect the cause or causes of action embraced in the matters and things mentioned and referred to in the suit in equity of W. C. Sterrett as Receiver of Alabama Trust & Savings Company, Complainant, v. Second National Bank of Cincinnati, Defendant, pending in the District Court of the United States for the Southern District of Ohio, Western Division; nor the subject-matter nor the subject of that suit; nor be set up or pleaded as partial or complete defense thereof; the scope of this settlement in so far as W. C. Sterrett as Receiver of Alabama Trust & Savings Company and its estate is concerned being only that, for the said consideration passing to him, he will not further pursue said lands and property transferred as herein provided to Tuskegee Land and Security Company, or in any manner the Receiver of Guarantee Bank & Trust Company; but shall not in any other manner whatsoever be affected. But this agreement shall be in bar of the right of said Sterrett, Receiver, or his successor in office, to have any accounting of said Second National Bank of Cincinnati on account of its claim originally acquired to the mortgage under the foreclosure of which it acquired its claim to said land."

Witness W. C. STERRETT, recalled:

Direct examination:

I got an order from Receiver E. D. Smith, for three boxes of books, only one of which was delivered to me, and which is now intact, containing no Ledger, Stock Books, Stock Certificate Book, Letter Correspondence. The box, when I received it, was tightly sealed and nailed up, and every one of the books which were in it are still there. There is a very old stock certificate book, but none of recent date.

Cross-examination:

The Alabama Trust & Savings Company was never a member of the Birmingham Clearing House. They made application for membership, which was refused.

166 *Testimony for Defendant, Taken at Cincinnati, Filed March 29, 1913.*

Witness GEORGE W. WILLIAMS.

Direct examination:

My name is George William Williams; am Vice-President of the Fourth National Bank at the present time; was formerly connected with the Second National Bank of Cincinnati for 21 years, engaged therein as follows: assistant receiving teller, receiving teller, paying teller, assistant cashier, cashier and Vice-President, being Cashier about eight or nine years, Vice-President a little over a year, which latter office I held until April 20, 1911.

There was a transaction of considerable importance and a good

deal of money between that bank and the Alabama Trust & Savings Company of Birmingham, Ala. Ben T. Head, President of the latter bank, arranged for a loan of $100,000, with 1,000 shares of that stock as collateral, under an agreement whereby the amount was to be deposited to the credit of the Alabama Trust & Savings Company, and not to be checked on during the life of any part of the loan.

The arrangement between the two banks was, that there was a resolution passed by the Alabama Trust & Savings Company arranged by Mr. Head and sent by the Alabama Trust & Savings Company, which I produce and which reads as follows:

Copy.

Letterhead of Alabama Trust & Savings Co.

BIRMINGHAM, ALA., Oct. 10, '08.

At a meeting of the Directors of the Alabama Trust & Savings Company, held this day, at which all of the Directors of said company were present the following resolutions were adopted:

Whereas that Ben T. Head, of Birmingham, Alabama, has negotiated a loan for $100,000.00 from the Second National Bank of Cincinnati, Ohio, and has attached to his note four (4) certificates Nos. 209-10-11-12 amounting to 1,000 shares of stock in Alabama Trust & Savings Company.

Whereas to secure the Second National Bank of Cincinnati from any loss on said note

Be it resolved, that permission is hereby given to Second National Bank of Cincinnati to charge said note or any part of it to the account of the Alabama Trust & Savings Company now deposit in the Second National Bank of Cincinnati, upon three (3) days' notice to the Alabama Trust & Savings Company.

167 I do hereby certify that the above is a correct copy of a resolution passed at a meeting of the Directors of the Alabama Trust & Savings Company, held this 10th day of October, 1908.

(Signed) BEN T. HEAD, *Pres't.*
ECTOR H. SMITH,
Sec. Pro Tem.

After that came to hand we either received the notes of the individuals who we were told had agreed to take the stock, endorsed by the Bank, or the notes of the Bank endorsed by the individuals.

After Brannon and Smith gave their notes, the notes were changed to seven or eight, I think. I am sure they were changed, being the notes of individuals endorsed by the Bank.

They came in a letter which read as follows:

(Letter Head.)

Alabama Trust & Savings Company.

BIRMINGHAM, ALA., Jan. 19, 1909.

Mr. G. W. Williams, Cashier, Cincinnati, Ohio.

DEAR MR. WILLIAMS: I am sending you notes as follows:

Gus T. Brannon	bal. 6,500	$7,300.00
Tom Stobert		10,000.00
W. K. Smith		10,000.00
Jas. R. Lewis		5,000.00
Interstate Securities Co.	24,200	25,000.00
Ector H. Smith		15,000.00
Gus T. Brannon (Collateral)		15,000.00
		87,300.00

I am sending this as per our conversation of yesterday. You are at liberty to charge any or all of these notes to us at any time.

Yours very truly,

(Signed) GUS T. BRANNON.

On June 3, 1909, I, as Vice-President, wrote a letter to the Alabama Trust & Savings Company which reads as follows:

June 3, 1909.

Alabama Trust & Savings Bank, Birmingham, Ala.

GENTLEMEN: We have this day credited to your account the proceeds of the following notes:

168 One note dated May 1st, 1909, for $15,000.00 endorsed by Gus T. Brannon.

One note dated May 1st, 1909, for $14,200.00 endorsed by Interstate Securities Company.

One note dated May 1st, 1909 for $5,000.00 endorsed by Jas. R. Lewis.

One note dated May 1st, 1909, for $10,000.00 endorsed by W. K. Smith.

One note dated May 1st, 1909, for $15,000.00 endorsed by Tom Stobert.

One note dated May 1st, 1909, for $10,000.00 endorsed by Enos R. Stewart, all payable on demand, and as per your instructions have charged your account with the following notes which we enclose herewith:

8215	Interstate Securities Co., note balance	$24,200.00
8216	Gus T. Brannon note balance	5,000.00
8217	Jas. R. Lewis note	5,000.00
8214	W. K. Smith note	10,000.00
8218	Ector H. Smith note	15,000.00

8213	Tom Stobert note	10,000.00
8212	Gus T. Brannon note	15,000.00
	Total	84,200.00

Yours very truly,

____ ____,
Vice-President.

None of these notes have been paid.

An agreement was made between the City Bank & Trust Company of Birmingham and the Second National Bank of Cincinnati which reads as follows:

This agreement entered into this 22nd day of March, 1910, by and between The Second National Bank of Cincinnati, Ohio, and the City Bank & Trust Company of Birmingham, Alabama, Witnesseth:

That whereas, the said, The Second National Bank of Cincinnati, Ohio, holds seven (7) notes executed by the Alabama Trust & Savings Company,' endorsed by several endorsers, aggregating $84,200.00 upon which there remains a balance due of $66,544.67, and,

Whereas, said The Second National Bank of Cincinnati, Ohio, claims that the City Bank & Trust Company is liable to it for the payment of said notes, and,

Whereas said, The City Bank & Trust Company have questioned its liability for the payment thereof,

Therefore, in consideration of the mutual agreement hereinafter contained on behalf of said, The City Bank & Trust Company, The Second National Bank of Cincinnati, Ohio, does hereby release said, The City Bank & Trust Company from any liability for the payment of $50,000.00 of the amount due upon said notes.

In consideration whereof, said The City Bank & Trust Company does hereby guarantee the payment of said notes to the extent of $16,544.67, said sum to be paid by said Bank in addition to any amount collected from the makers or endorsers, provided however, that if said, The Second National Bank shall collect from the maker and endorsers of said notes a sum exceeding $50,000.00, then such surplus shall be returned to the City Bank & Trust Company. Said The City Bank & Trust Company further releases said The Second National Bank from any liability on account of any payments heretofore made upon said notes.

In consideration whereof, the parties hereto have caused their corporate names to be subscribed by their respective officers thereunto duly authorized.

THE SECOND NATIONAL BANK,
(Signed) By G. W. WILLIAMS, *Cashier.*
THE CITY BANK & TRUST CO.,
(Signed) By C. H. SEALS, *Vice-President.*

The $16,544.67 mentioned in this agreement is the balance of the City Bank's deposit in our Bank. This balance was finally applied to that Bank's indebtedness, though I am not quite sure.

Upon the notes exceeding $50,000.00 referred to in the agreement, we collected little or nothing. The collection on them was not in excess of $50.00.

There was another indebtedness, of $28,000 due The Second National Bank from Alabama Trust & Savings Company, concerning which I do not remember the collateral pledged.

(Witness identified letter of May 1st, 1909, and same is offered in evidence. It reads as follows.)

Letter Head.

May 1st, 1909.

At a meeting of the Directors of the Alabama Trust & Savings Company held this day the following were present:

G. T. Brannon,
Ector H. Smith,
Tom Stobert, and
Enos R. Stewart.

The following resolution was passed:

"Resolved: That the President of this Bank be and is hereby authorized to borrow from the Second National Bank of Cincinnati
$115,000.00 or less on such terms and for such time as he
170 may approve, and to pledge as security for the repayment
thereof, such assets of this Bank as may be advised and agreed upon between him and the Second National Bank of Cincinnati, and to give this Bank's obligation or obligations in evidence thereof, and from time to time, when obligations evidencing such loan mature to renew the loan in whole, or in part until the same is paid in full.

(Signed) GUS BRANNON,
President.

JAS. R. LEWIS, *Secretary.*

[SEAL.]

(Witness identified copy of resolution furnished his Bank, dated July 10, 1909, which defendant offered in evidence and which reads as follows:)

Letter Head.

July 10th, 1909.

At a meeting of the Board of Directors of the Alabama Trust & Savings Company, held in their banking office this afternoon, the following Directors were present:

Gus T. Brannon,
Tom Stobert,
Enos Stewart.

This being a majority of the board.

Upon motion the following resolution was read and adopted:

Resolved: That the President or Vice-President of this Bank be authorized to borrow $28,000 from the Second National Bank of Cincinnati, Ohio, and to pledge as collateral security such notes as may

be agreed upon, and to reduce this loan at any time, or to secure such renewals from time to time as may be agreed upon.

This July 10th, 1909.

[SEAL.] (Signed) GUS T. BRANNON,
President.

(Signed) TOM STOBERT, *Cashier.*

The $28,000 was then loaned. I do not know whether it was ever paid, and I could not say if any collateral were given for it.

Cross-examination:

I became first acquainted with Ben T. Head through the transaction of a loan of $100,000, but whether I met him personally or it was through correspondence, I can not say. A record was made of it in the Bank but I do not remember the form of the note and signature.

After leaving the Bank, the Second National, I had nothing more to do with these transactions.

171 While with the Second National, all correspondence relating to these loans passed through my hands as Cashier or Vice-President and were filed with the general officers' mail of that Bank and I think the correspondence would be kept by it. My recollection is that 1,000 shares of the Alabama Bank was pledged to secure the $100,000 loan, but I could not say at this time in whose name the stock appeared. It would be listed in the Record Ledger of the Second National, but that record would not show in whose name the stock appeared.

My recollection is that Mr. Head called at the Second National Bank and met me when the loan was arranged, all of the general officers of the Second National being in the room.

I had no knowledge at that time of the Alabama Trust & Savings Company and was not acquainted with E. N. Cullom. I do not know if sight draft was made to E. N. Cullom.

If the Second National received any additional collateral for that loan, from Head or the Alabama Bank, it was filed in the general collateral but no record made of it. The Second National has no book or record of any kind from which a list of such collateral could be gotten. It would not appear on the general ledger.

I was in Birmingham one time, some time after the connection was made between the two banks and I there met Mr. Head and called on Messrs. Stobert, E. R. Smith and John M. Webb. I was there only one day and that was after the hundred thousand dollar loan had been made. I can not say whether any change had been made in the form of the loan at that time.

I can not say whether the Second National Bank let the Alabama Trust & Savings Company have any part of the $115,000, but if it did, the discount register and record register of the Second National Bank would so show.

I remember the $28,000 loan and recall that notes of the customers of the Alabama Trust & Savings Company were pledged as collateral to secure it, but the amount of collateral I do not know.

I can not say that when Head negotiated the original loan it was

understood the Alabama Trust & Savings Company was to leave a deposit with the Second National Bank of at least the amount of the loan, but if such a written agreement were made, it ought to be in the files of the Bank. The Alabama Bank had that much on deposit when the hundred thousand dollar loan was originally put through.

The amount was credited on our books to the Alabama Bank,
172 but after the sight draft of $100,000 was drawn and paid, I am not clear that the Alabama Trust & Savings Company had any part of it left to its credit and I can not say who made the draft.

"Q. Mr. Williams, is there any reason why you can not go to the Second National Bank between now and the next time you are asked to appear here and refresh your mind?

"A. I suppose they would let me look at the books.

"Q. Mr. Williams, we will ask you to do that if you please, so that you may speak definitely on that point.

"A. All right."

Witness ELMER E. GALBREATH, called for defendant, testified as follows:

Direct examination:

My name is Elmer E. Galbreath; I have been connected with the Second National Bank of Cincinnati about six years and a half, being first Vice-President, then President one year, last year.

I was not present when the loan of a large amount was made on the stock of the Alabama Trust & Savings Company. My attention was called to it on my return from New York after the loan had been made. My impression is that it was made to Mr. Head, but I do not remember. I do not remember seeing a note, but my recollection is that Ector H. Smith and Gus T. Brannon substituted their notes for the first note.

The loan was reduced from $100,000 to $84,000 from proceeds of stock sold by the people in Birmingham, I suppose. The money was remitted from there to the Second National Bank and we turned back stock as they remitted the money.

Next the notes were split up into different notes made by Ector Smith and his brother, Gus T. Head, J. R. Lewis, Tom Stobert and Interstate Securities Company. They were received by the Alabama Trust & Savings Company from the makers and made payable to the Alabama Trust & Savings Company and endorsed by it and transmitted to the Second National Bank, which Bank received the following letter, which defendant offers in evidence:

(Same letter as Exhibit B, supra.)

These notes were afterwards changed to the Alabama Trust and Savings Company, and endorsed by these different individuals that had made the notes before, and this change came about through a

visit which I made to Birmingham.

173 We wanted the notes of the Alabama Trust & Savings Co. as maker instead of endorser, and I went to Birmingham on this account and remained there one or two days, talking with the officers of the Alabama Trust & Savings Company, but mainly with Mr. Brannon.

I made no statement or representation to them to induce them to make the change, but I did talk with them on the subject. I do not remember what was said. We wanted the notes paid and I did request them to make this change in the form of the notes. I told them I had been sent by the Bank or the Board, and they were not satisfied with the matter, and first we wanted them paid. That was the main thing, but if they could not be paid, they must be made a direct obligation of the Bank instead of indirect and instead of an endorsement.

I do not remember how many meetings of the officers were had but Mr. Brannon and Mr. Smith were there with several of their directors and I talked chiefly with Mr. Brannon as he was President of the Bank. I do not believe I went into details with any of the others. I believe they had a directors' meeting but I did not attend it. I was in Mr. Brannon's office and I do not know where they held their meeting. They did not refuse to change the note, but there was no disposition so far as any action I saw, in which they did not want to change. The change was willingly made.

Collateral was given at the time. I could not say how much. It consisted of their bills receivable; notes of various kinds. I brought the collateral back to the Second National Bank and turned it over there to the discount clerk or to Mr. Williams the Cashier.

I suppose some of it was collected, but I could not answer that without referring to the books of the bank, which would show how much was paid on their obligations.

There was at that time about $17,000 or $18,000 of the Alabama Trust & Savings Company on deposit, the exact amount of which I do not remember. It was charged to their account, but I do not know whether the full balance was so charged. As I remember it, it was probably an even amount and credited to the obligation of the Alabama Trust & Savings Company; that is, on their notes.

We had other things belonging to them or in which they were interested, consisting of collateral of the same nature held for monies borrowed, and the amount of which I do not remember. Another loan that I know of was for $115,000.

"Q. I call your attention to this paper, Exhibit D, a written
174 agreement between the Second National Bank and The City Bank & Trust Company, do you recognize the signatures?

"A. Yes.

"Q. That is an original document, is it?

"A. Yes.

"Q. Tell us what was done afterwards about the collateral?

"A. Mr. Carl Seals was Vice-President of The City Savings Bank & Trust Company, and he came up from Birmingham and was at our bank, and we went through the collateral with Mr. Seals and Mr. Seals, together with, I believe Mr. Williams and myself, looked over the collateral and selected the collateral that we would retain, we then turned over the balance of all the collateral we held to Mr. Seals as Vice-President of the City Bank & Trust Company."

The Alabama Trust & Savings Company at that time had gone out of business and been absorbed by the City Bank & Trust Company

and all of its assets had been turned over to the City Bank. The collateral then returned to the City Bank was all the collateral held by the Second National Bank for the account of the City Bank & Trust Company and the Alabama Bank and all the different banks that they absorbed.

I do not recollect how much we retained, but supposed it to be enough to protect the notes that we held. It turned out very bad, not being sufficient to pay the notes. I do not remember the balance unpaid or the number of the notes &c. we sent back, but it was quite a number. I could not tell what balances remained unpaid without referring to the books of the Second National Bank.

"Q. Will you kindly endeavor to find out for us?

"A. Yes."

These notes were made by the Alabama Trust & Savings Company and endorsed by these different individuals.

So far as I know, the Alabama Trust & Savings Company was liable on this paper from beginning to end.

I know the letter of April 10, 1908 (Exhibit A, supra), has the genuine signatures thereto of Ben T. Head and Ector H. Smith. I first saw it at the Second National Bank, which received it from the Alabama Trust & Savings Company.

I do not remember the date of the note that Head gave. I was not present when the Head note was given, but recognize as an original paper sent by the Alabama Trust & Savings Company to the Second National Bank a paper now handed me, which purports to be
175 certified copy of the meeting of the Board of Directors of the Alabama Trust & Savings Company held October 17, 1908, and which reads as follows:

"Meeting of the Directors, Alabama Trust & Savings Bank, held October 17th, 1908, with the following Directors present:

Gus T. Brannon,
Ben T. Head,
Ector H. Smith,
R. C. Head.

The following resolution, upon motion and second, was passed by said Board.

At a meeting of the Directors of the Alabama Trust & Savings Company, held this day, at which all of the Directors of said Company were present, the following resolutions were adopted.

Whereas that Gus T. Brannon and Ector H. Smith, of Birmingham, Alabama, has negotiated a loan for $100,000 from the Second National Bank of Cincinnati, Ohio, and has attached to his note four (4) certificates No. 209-12 amounting to 1,000 shares of stock in Alabama Trust & Savings Company, and to secure the Second National Bank of Cincinnati from any loss on said note.

Be it resolved, That permission is hereby given to Second National Bank of Cincinnati to charge said note or any part of it to the account of the Alabama Trust & Savings Company, now deposited in the Second National Bank of Cincinnati, upon three (3) days' notice to the Alabama Trust & Savings Company.

I do hereby certify that the above is a correct copy of a resolution

assed at a meeting of the Directors of the Alabama Trust & Savings Company, held this 17th day of October, 1908.

(Signed) BEN T. HEAD,
President.
ECTOR H. SMITH,
Sec. Pro Tem.

EXHIBIT "J."

Cross-examination:

My connection with the Second National Bank ended some time n April, 1912. I had practically nothing to do with the transactions vith The Alabama Trust & Savings Company until the latter part of heir dealings with the Second National.

"Q. Now the loan of $100,000.00 by the Second National Bank vas an individual loan to Ben T. Head was it not?

"A. As I understand it, it was.

176 "Q. And as collateral, your bank received $100,000.00 of the capital stock of the Alabama Trust & Savings Company.

"A. As I understand it they did. I did not handle the loan nor he collateral, and I never saw it."

My understanding of the matter is that Head drew for the amount of the loan to him when it came through the Clearing House. As I remember, a little later on, the form of the loan was changed to Ector H. Smith and Gus T. Brannon, and stock having been sold in the amount of $16,000.00, they gave their notes or note for $84,000 and we surrendered $16,000 of the stock which he had held as collateral and Mr. Head was released from his obligation and his note was surrendered.

I made several visits to Birmingham in connection with these transactions.

The form of the loan was not changed more than once, which was in Birmingham at the time I have testified about. My purpose in going to Birmingham was to get the money or to get it fixed in the form the Bank wanted it. I do not believe the new notes were delivered to me there, but I am not sure; the collateral was, with the list made by the Alabama Bank in duplicate, one of which was returned. I do not claim or say that at any time when these various changes were made any additional money passed either to the individuals or to the Alabama Trust & Savings Company. In other words, so far as the cash transaction was concerned, it never was changed from beginning to end except as to the payment of $16,000.00 and money derived from collateral and the application thereof by Second National Bank of the balance to the Alabama Trust & Savings Co. I am not sure about the application of the balance immediately upon my return to Cincinnati but the books of the Second National will show the date of that application. When I go to look at the books of the Bank I will let you have that date.

When I speak of an indebtedness still due the Second National Bank from the Alabama Trust & Savings Company, I include the amount of $84,000 as evidenced by these different notes as a part of such debt. My statement that the Alabama Trust & Savings Com-

pany was liable from beginning to end upon the money borrowed by Mr. Head is an inference drawn from the circumstances, as I heard them.

When these individuals first gave their notes, namely, the two Smiths, Stobert, Stewart, Brannon and the Interstate Securities Company, those notes were made by them and endorsed by the
177 Alabama Trust & Savings Company. Then later on those notes were surrendered and the Alabama Trust & Savings Co. gave its direct obligation with the individual endorsements. That is, each individual endorsing a note corresponding with the amount of his note before. So far as I know, Mr. Seals had no connection with the Alabama Trust & Savings Company.

When I go to the Bank I will ascertain if the collaterals turned over to the Second National Bank are shown by its records, and let you know what that record is.

I do not remember that any three days' notice was given to the Alabama Bank by the Second National that the Second National would charge the loans represented by the different notes to the Alabama Bank.

Witness BEN T. HEAD, called for defendant, testified:

Direct examination:

My name is Ben T. Head; reside in Memphis, Tenn. About the last of September, 1908, I telephoned to Mr. G. W. Williams, Cashier of the Second National Bank, Cincinnati, Ohio, and explained to him that I could buy the stock of the Alabama Trust & Savings Company, controlled by E. N. Cullom, and that by buying it and consolidating with it the Citizens Savings Bank of Birmingham, that with the assets of both banks I could start up a prosperous banking business; that if he would make a loan to me of one hundred thousand dollars with which to purchase the entire stock from Mr. Cullom, I could place that stock with different parties which would be an advantage to the Bank and build up a good business by doing this. I said to Mr. Williams that I would make my note payable on demand for $100,000.00 with one thousand shares of the Alabama Trust & Savings Company attached to the same and that during the life of this loan, that I would see that the account of the Alabama Trust & Savings Company with the Second National Bank would not be less than $100,000.00 at any time.

On October 10, 1908, a resolution was passed by the Directors and every stockholder of The Alabama Trust & Savings Company guaranteeing the loan that the Second National Bank had made to me personally. Exhibit A, supra, is a copy. It was passed at the request of the Second National Bank, acting through Mr. Williams after our conversation.

A short time after this resolution was passed, Messrs. Smith
178 & Brannon approached me to sell out to them my interest in the Alabama Trust & Savings Company, and we agreed that they pay me $4,000 in cash, assume my liability to the Second National Bank for $100,000.00 and return me my note for that sum given to that Bank for payment of the stock. This they afterwards

did. When my note was taken up, they substituted a resolution for the same to the Second National Bank under their management as President and Vice-President and after I left the Alabama Trust & Savings Company, since which time I have had no connection with it.

After I left the Alabama Trust & Savings Company and in the early part of 1909, the City Bank & Trust Company was organized and I was elected President. There was no connection between it and the Alabama Trust & Savings Company until September, 1909, when negotiations were undertaken by John W. Worthington, E. C. Smith, Gus T. Brannon, George Welt, Ben Parver and myself looking towards consolidation of the two banks, which was finally perfected along the lines outlined in the agreement signed by the committee appointed by both banks to effect the consolidation. I then resigned as President and Mr. Worthington was elected President of the City Bank & Trust Company.

I remember a paper constituting the agreement for the consolidation.

(Witness identifies copy of original paper which is offered in evidence by defendant. It is the same as Exhibit 6 to the amended bill of complaint filed in this case June 10, 1914; this record, page —). I then resigned as President, but was in the Bank at the time the papers and everything was transferred over to the City Bank & Trust Company according to that agreement, which was carried out, so far as I know.

After the notes of Smith and Brannon were substituted for my note in the Second National Bank and subsequently changed by the directors of the Alabama Bank, they were forwarded and passed upon as being good because they were considered the obligations of the Alabama Trust & Savings Company bound for those notes given by these directors for the stock in the Bank, and we treated them as a liability of the Alabama Trust & Savings Company and figured that when we took the Bank over. I was a member of the Committee of the City Bank for the purpose of consolidation and took part in it.

So far as I know, while I was in the Alabama Trust & Savings Company, nobody connected with it objected to the passage of the resolution authorizing the Second National Bank to charge it
179 to them. Every share of stock was represented at the meeting when the resolution was passed, and they were familiar with the transaction that was going on.

Cross-examination:

At the time I promised to keep a balance of $100,000 in the Second National Bank the assets of the Alabama Trust & Savings Company amounted to $157,000 and no liabilities except to stockholders. I expected to deposit all the resources of the Alabama Trust & Savings Company in the Second National Bank and keep it that way, which I did. I do not remember the exact balance there when I sold out my stock on the 17th day of October, 1908. On October 10, 1908, I owned all the stock except a few shares that I had transferred to a few parties, and I controlled the whole situation.

When I sold out to Ector H. Smith and Gus Brannon, October 17,

1908, I retained primarily five shares and continued to act as director until they could formulate their plans and take up all my obligations to the Second National Bank, which they did a very short time thereafter. After the consolidation and after I resigned as President of the City Bank, I continued to be a stockholder therein until the Bank failed some time in October, 1910.

I do not know whether the City Bank paid the Alabama Bank's obligations or not. After I ceased to be president, I was refused any information by the president of the City Bank and had no knowledge of the condition of the Bank other than what I read in the papers.

All of the assets of the Alabama Trust & Savings Company were at the time of the consolidation transferred to the City Bank & Trust Company, consisting of some stock, notes and assets that make up a general banking business.

"Q. What provision did the City Bank & Trust Company make for the liability of The Alabama Trust & Savings Company?

"A. They conferred with the Second National Bank people."

To the best of my knowledge I made the payment to Mr. Cullom for the purchase of stock from him by giving him a draft on the Second National Bank for $100,000 and a check for $7,500 on the Citizens Savings Bank.

(Here the defendant offered the following notes which constitute parts of Exhibit A to the answer of the defendant in this suit, which was filed June 29, 1907:)

180

Maker.		Endorsers.	Date.	Amount.
Alabama Trust & Savings Company.	Alabama Trust & Savings Co.....	and Ector H. Smith.	May 1, 1909	$15,000
do.	do.	and W. K. Smith.....	do.	10,000
do.	do.	and Jas. R. Lewis.....	do.	5,000
do.	do.	and Interstate Securities Co.....	do.	14,200
do.	do.	and Enos R. Stewart....	do.	15,000
do.	do.	and Gus T. Brannon....	do.	15,000

page this record.)

Upon these notes appear the following endorsements:

Note endorsed by—	Endorsements.
Ector H. Smith	Interest paid Aug. 1st, 1909.
	Interest paid Nov. 1, 1909.
	Interest paid Feb. 1, 1910.
	$15.00 paid Jan. 4, 1911.
W. K. Smith	$7,200.00 paid June 11, 1909.
	Interest paid Aug. 1, 1909.
	Interest paid Nov. 1, 1909.
	Interest paid Feb. 1, 1910.
	$10.00 paid Jan. 4, 1911.
Jas. R. Lewis	Interest paid Aug. 1st, 1909.
	Interest paid Nov. 1, 1909.
	Interest paid Feb. 1, 1910.
	$5 paid Jan. 4, 1911.

Interstate Securities Co., per Gus T. Brannon, Pres't	Interest paid Aug. 1st, 1909.
	Interest paid Nov. 1, 1909.
	Interest paid Feb. 1, 1910.
	$10,455.33 paid Oct. 1, 1910.
	$24.20 paid Jan. 4, 1911.
Enos R. Stewart	Interest paid Aug. 1st, 1909.
	Interest paid Nov. 1, 1909.
	Interest paid Feb. 1, 1910.
	$12.90 Jan. 4, 1911. Paid.
Gus T. Brannon	$10,000 paid June 11, 1909.
	$55.33 paid July 9, 1909.
	Interest paid Aug. 1st, 1909.
	$300.00 paid Aug. 3, 1909.
	$100.00 paid Aug. 30, 1909.
	Interest paid Nov. 1, 1909.
	Interest paid Feb. 1, 1910.
	$12.90 paid Jan. 4, 1911.

181 Witness CHARLES M. LESLIE, called for defendant, testified:

Direct examination:

My name is Charles M. Leslie; age, 41; attorney at law; residing at Cincinnati. Was attorney for the Second National Bank for three or four years prior to April, 1912, during which time my attention was called to a loan of $100,000 which had been secured by stock of the Alabama Trust & Savings Co. but which had been reduced by that time.

My attention was called to the condition of this matter prior to May, 1909, and when it came to my attention, the total indebtedness was $84,000 made up of a number of notes of the Interstate Securities Company, Tom Stobert, Ector Smith, W. K. Smith, and I think a note of Gus T. Brannon, and Lewis. These notes were executed by these parties. They were signed by these parties and endorsed by the Alabama Trust & Savings Company. I am not certain whether they were made payable to the makers and endorsed by the makers and the Bank. They were signed by the different individuals.

They were taken to Birmingham and other notes received by the Second National, wherein the Alabama Bank was the maker and the original makers became endorsers in exactly the same amounts.

(Here the witness is shown the six notes last offered above, and identifies them as being notes taken in exchange for the original notes.)

These notes total only $74,200. My recollection is that there was another $10,000 note.

(At this point defendant offered in evidence a note of which the following is a copy:)

EXHIBIT R.

"CINCINNATI, OHIO, October 1, 1910.

$15,000.00.

On demand after date I promise to pay to the order of Second National Bank, Fifteen Thousand Dollars, value received, payable at Second National Bank, Cincinnati, O.

(Signed) GUS T. BRANNON,
Address, 835 *Old Colony Bldg.*,
Chicago, Ill.

No. —.
Due —.

182 Endorsements: $12.90 paid January 4, 1911. Interest paid February 1, 1911.

I know the Second National Bank had quite an amount of collateral which it held to secure these notes, most of which was negotiable at the time. After Mr. Webb became President of the City Bank & Trust Company which, as I understand, took over the assets of the Alabama Trust & Savings Company, there was an agreement made between the Second National Bank of Cincinnati and the City Bank & Trust Company in regard to liability on these notes. My recollection is that there was then due something in excess of $66,000 and an agreement was made with Mr. Carl Seals, as I recollect was the gentleman's name who was Vice-President of the City Bank & Trust Company, who represented the City Bank & Trust Company. At that time all of that collateral was surrendered to him except what was considered enough to secure about $16,000 of this liability.

At that time all of that collateral originally given by the Alabama Trust & Savings Company had been collected and applied on a note of the Alabama Trust & Savings Company for, I think, $28,000. Now whether any of the other collateral had been collected and applied on any of these series of notes I have referred to, I do not know.

All of the collateral that the Second National was holding against this series of notes was surrendered back to Mr. Carl Seals except what the Second National considered sufficient to secure this balance of $16,000.

Cross-examination:

The $28,000 indebtedness was independent of this other indebtedness of $84,000, and I think was paid.

Redirect examination:

Attorney for defendant shows witness two sheets which he identifie sas being taken from General Ledger Account of the Second National Bank, which, as far as material, shows that on June 8, 1909, Second National Bank had a checking deposit of Alabama Trust & Savings Company, of $17,295.96 against which was charged June 11, 1909, $17,200, leaving a balance, June 11, 1909, of $95.96.

Witness ELMER E. GALBREATH, recalled for further

Direct examination:

183 I have not looked over anything about that collateral more than when I was last on the witness stand. I have since gone to the Bank and Mr. Gutting of that Bank said he was looking it up, and I asked him to get up a statement of it and I gave the Bank a list of what the attorneys asked me for, and they said they would do it.

Cross-examination:

"Q. Mr. Galbreath, both for Judge Peck and myself, I will ask whether you have obtained the information from the Second National Bank which we requested you to obtain when you were last on the stand?

"A. No, I have not obtained it. After leaving Judge Peck's office, I went to my office and wrote a letter to the Bank requesting the information asked of me, and Mr. Cook, the Vice-President of the Bank, informed me that they would go right at it and get the information.

"Q. But it has not been furnished you up to this date?

"A. No."

Witness GEORGE W. WILLIAMS, recalled for defendant:

Direct examination:

"Mr. Williams, did you find any of those lists of collateral which I inquired about?

"A. I was not permitted to go into detail into the assets of the Bank. I looked up the credit ledger record, but as to the collateral which they got, collateral exchanged, or collected, etc., would be a matter of a lot of work of going into the books and I would not be permitted to go into the books and I could not give you a list of the collateral without digging into the books. I could give you a list of the transaction of how it came into the bank, etc. On January 20, 1909, there were seven different notes for a total of $87,300.00 face value, endorsed by The Alabama Trust & Savings Company which took up the Smith & Brannon notes. There was some little payments made on these and on June 4, 1909, the Alabama Trust & Savings Company gave seven notes for a total of $84,200.00 face value, which were endorsed by the individuals, to take up the notes of January 20, 1909."

At that time, June 4, 1909, the Alabama Trust & Savings Company was a depositor in the Second National Bank with an active account, money being paid in and drawn out frequently. I have examined the sheets.

(Witness was here shown the two sheets last above referred to in connection with the testimony of Leslie, which he also identified, and showing him the account opened October 5, 1908, and closed October 21, 1909, and concerning same, continued his testimony:)

184 The amount on deposit to the credit of the Alabama Trust & Savings Company, October 5, 1908, was $135,000 deposited that day and $25,000 withdrawn on same day, leaving a balance of $110,000. It is my recollection that the Second National Bank received collateral which it held in the form of General Collateral when the Alabama Trust & Savings Company gave its seven notes endorsed by the individuals, instead of the individual notes it had previously held.

As to whether there was collateral given for the $28,000 notes to the Second National Bank, my recollection is that we had collateral for all the Alabama Bank's indebtedness. The collateral was general. We watched the maturities of those notes, we would send them down there for collection before maturity. In some cases they would be renewed, and the renewed note sent back to us, some cases part payments would be made and the note would be credited with the part payment, and the balance of the collateral in the form of renewal would be filed as collateral, and in some cases the payment was made in full, and they would either remit for it by check or they would advise us that they had charged our account there, and we would credit the account with the principal note.

"Q. Mr. Williams, I have here lists of collateral which were filed by Mr. Ector H. Smith in connection with his testimony. I wish you would look it over and see if you recognize them as coming from your bank or where?

"A. Yes, this is in the writing of our Discount Clerk, Robert Tulker, and is a list of collateral that he held."

(The paper referred to by the witness is Exhibit 1 to the testimony of Ector H. Smith already shown on page — of this record.)

Cross-examination:

"Q. It is recited in this Exhibit "D" that the note executed by the Alabama Trust & Savings Company, endorsed by the several individuals, aggregating $84,200, has been reduced to $66,544.67. Can you tell how this reduction was made?

"A. To my best recollection the reduction was due to credits made from the collection of collateral."

The account of the Alabama Trust & Savings Company was closed in the Second National Bank on October 21, 1909, at which time there was a credit on the books of the Second National Bank of $1,061.02 due the Alabama Trust & Savings Company.

185 Redirect examination:

According to my recollection we retained sufficient collateral to cover the remainder of the indebtedness, to secure the balance of $16,544.67 and that amount we carried, and my recollection is that it was in excess of $50,000, but how much in excess of $50,000 I do not know.

Witness ELMER E. GALBREATH, recalled.

Direct examination by Mr. Roettinger, attorney for plaintiff:

"Q. Mr. Galbreath, have you succeeded in getting the information which we asked you to procure at the Bank a few days ago?

"A. No, I have tried to get it but could not. Mr. Gutting said he gave the information to Mr. Williams and that Mr. Williams had it." I am not able to give you any further information.

"After leaving here I wrote a letter to the Bank requesting that they supply this information asked for, and the letter was handed to Mr. Cook, the Vice-President and he directed me to Mr. Gutting. Mr. Gutting informed me that he had given all these matters to Mr. Williams, and that he did not have the papers, so that he could not give it to me."

Additional Testimony Taken by the Plaintiff, March 28, 1913.

Witness JOHN G. GUTTING, says:

My name is John G. Gutting; residence, Glendale, Ohio; I am with the Second National Bank. At present I have no position, except that I am with the Second National Bank, and I have been with the Bank 27 years, and have made an examination of the account of the Alabama Trust & Savings Company as it existed on March 22, 1910, or prior thereto, and at the same time, of the City Bank & Trust Company, both of Birmingham, Ala.

Nothing has been collected on account of the collateral deposited with the Second National Bank prior to the date given by the Alabama Trust & Savings Company on account of some seven notes,
186 which are in evidence in this case, after March 22, 1910.

I have not been able to find a list of the collateral received from the Alabama Trust & Savings Company which was turned over to the City Bank & Trust Company March 22, 1910, and I can not tell the amount of the collateral retained by the Second National Bank which it received from the Alabama Trust & Savings Company after the arrangement with the City Bank & Trust Company of March 22, 1910. I have not a list of that collateral and I can not tell from memory the terms of the arrangement of March 22, 1910, between the Second National Bank and the City Bank & Trust Company.

Cross-examination by attorney for defendant:

I have looked to see how much collateral was collected on claim against Alabama Trust & Savings Company before March 22, 1910, and the amount was only $455.33 from collateral. On a later date, all the collateral the Second National Bank held was sold on the Cincinnati Stock Exchange for $6,662.10. Of that amount $3,945 was applied against the City Bank & Trust Company loan No. 2511; $2,000 against the City Bank & Trust Company loan No. 3714, and $250 against the Guarantee Bank & Trust Company loan No. 6197.

Applying all proper credits existing on the notes against the Alabama Trust & Savings Company, there remains an indebtedness of $51,477.57.

I have been over the accounts, and I have kept books all my life and been connected with the bookkeeping department of the Second National Bank, and that amount of $51,477.57 is correct. The reason the collateral appears to be in a very doubtful condition is due to the settlement with Seals and other causes.

When Seals came up here an arrangement was made with him by which a large amount of the collateral was turned back to the City Bank & Trust Company, and he took it back to Birmingham and it was used, as I am told, by the City Bank. Then there was other collateral which we forwarded to the City Bank for collection and shortly afterwards the City Bank failed and went into the hands of a receiver, and the receiver had a considerable quantity of collateral which he appropriated and would not give up.

Redirect examination:

When I spoke of the indebtedness of the Alabama Trust & Savings Company, I included in that amount the sum of $84,200 which was represented by some seven notes either signed or endorsed by
W. K. Smith, Ector H. Smith, Gut T. Brannon, Lewis Sto-
187 bert, Interstate Securities Company, and Stewart, so that when I speak of balance still owing of $51,477.57, I take into consideration this $84,200 as it existed and was represented by these several notes.

Additional Testimony for Plaintiff, Taken at Birmingham, Beginning 28th Day of July, 1914.

Witness L. A. FREEMAN, sworn, testified as follows:

Direct examination:

I am deputy register of the Chancery Court of Jefferson County, Alabama, and have been for two years and seven months. At present the register of the court is temporarily in Tennessee and will be gone about two weeks. At present I have sole charge of the records.

(At this point it was agreed between the parties and admitted by defendant, that Exhibit 7 to the bill in this case as amended is a correct copy of the original bill of complaint filed by Mrs. Kate Rowland and others against the Alabama Trust & Savings Company, of which no further proof need be made; that defendant in that suit, Alabama Trust & Savings Company, was served July 23, 1910, and demurred to the bill August 8, 1910, answered the bill October 25, 1910, as heretofore shown, and that the bill so amended September 25, 1910, is shown by Exhibit 8 to the amended bill in this case.

That Exhibit 1 to the original bill is a correct copy of the administration decree of said Chancery Court rendered and filed there the 27th of April, 1911; that June 3, 1912, the court in the Kate Rowland case made a decretal order allowing all claims of stockholders and creditors which had been filed and allowed twenty days from that date for all other creditors and stockholders to intervene; that June 5, 1913, that court allowed the claim of F. L. McMahan as a

stockholder of one share in the Alabama Trust & Savings Company, and on September 16, 1912, made an order allowing the claims of 34 other stockholders respectively of the Alabama Trust & Savings Company making in the aggregate 64 shares, for which each paid $125 per share, and that the payments therefor were made at different dates ranging from January 25, 1909, to August 11, 1909, the greater part of them being in April and May, 1909; that Exhibit 2 to the bill as amended in this case is a correct copy of the decretal order
188 of that court made March 8, 1912, authorizing W. C. Sterrett as Receiver of the Alabama Trust & Savings Company, to institute this suit.

The counsel for defendant did not admit the facts recited in these papers, but made no objection to the substitution of copies for originals, admitting the copies to be correct, his ground of objection being that they were immaterial and irrelevant.)

At this point the witness identified the original files in the Kate Rowland case, and the Alex. M. Garber, Attorney General, case. And the counsel for plaintiff admitted that the Second National Bank of Cincinnati was not a party in the Kate Rowland case.

Witness J. C. ELLIOTT, called for plaintiff, testified:

Direct examination:

I live at Vincent, Shelby County, Alabama, 35 miles from Birmingham, and had dealings with the Alabama Trust & Savings Company through its branch bank there, and filed my claim in the Kate Rowland case.

On October 27, 1909, I loaned that bank $200 for which I received a certificate of deposit dated that day, payable twelve months after date; and on January 15, 1910, I loaned the bank $1,500 payable twelve months after date. And these two certificates are attached to my proof of claim in the Kate Rowland case.

I know the handwriting of the Cashier, Mr. Willis, of the branch bank of the Alabama Trust & Savings Company at Vincent, Alabama, and I identify his signature to the following certificates of deposit handed me and which are attached to the proofs of claims of the respective parties in the Rowland case.

Name.	Amount.	Date.	Payable.
J. R. Davis, Sr.	$500.00	Nov. 24, 1909	4 Mos. after date.
Mack Kidd	401.75	April 13, 1909	12 "
J. R. Davis	208.00	Oct. 30, 1909	4 "
J. R. Davis	25.00	Jan. 5, 1910	4 "
J. R. Davis	42.00	Jan. 15, 1910	4 "
J. R. Davis	25.00	Jan. 29, 1910	4 "
Mrs. R. M. Mackey	125.00	December 24, 09	12 "
J. H. Martin	252.41	Nov. 20, 1909	4 "
Ed Thomas	9.00	Jan. 7, 1910	4 "
Ed Thomas	40.45	Oct. 1, 1909	4 "

The first I heard of the Alabama Trust and Savings Com-
189 pany being broke was along in January or February, 1910. Nothing has ever been paid me on its indebtedness owing me. The ordinary checking depositors got sixty per cent. That bank did business there in 1909 and 1910, I think.

Cross-examination:

I knew of no change in that bank, as the same stationery was used all the time, and I was informed that the branch at Vincent was a branch of the Alabama Trust & Savings Company at Birmingham. I know nothing of my own knowledge of the relationship. I know nothing about the City Bank & Trust Company, and never heard of it.

Redirect examination:

I never presented my claims to anybody else except the Receiver of the Alabama Trust & Savings Co.

Witness T. C. DOBBS, called for plaintiff, testified:

Direct examination:

I live in Birmingham; formerly at Fort Payne, De Kalb County, Alabama, where the Alabama Trust & Savings Bank had a branch bank and began business there in 1909, when I rented the bank room to it, acting through Gus T. Brannon, its President. I went to Fort Payne and brought back money there from persons who bought stock, and I turned it over to Gus T. Brannon. Those who lived at Fort Payne were W. W. Barbour, W. E. Quinn, Dr. W. S. Duff, S. F. Killian, C. M. T. Sawyer, Dr. C. W. Wright, L. W. Nichols, R. J. Chitwood, Miss Olena Dobbs, Miss Ella Dobbs, W. J. Chitwood, Mrs. Fannie Cotman; and living near Fort Payne were G. R. Horton, Dr. H. E. Killian, W. C. Hill, W. S. Killian, and D. L. Baker.

Each paid $125 a share for his or her stock.

I am deputy tax collector of Jefferson County, Alabama, and have examined the tax records with reference to R. C. Head, Ben T. Head and J. S. Head, Jr., from the year 1906 to 1914 and neither of them had anything assessed against them for taxes during those years.

Cross-examination:

Neither the Second National Bank of Cincinnati nor any of its officers have made any representations to me concerning the stock of the Alabama Trust & Savings Company.

190 Witness Dr. W. E. QUINN, called for plaintiff, testified:

Direct examination:

I live at Fort Payne, Ala., and have lived there for thirty years, and am a practicing physician. It is a place of about 1,500 people, fifty miles from Birmingham.

The Alabama Trust & Savings Company began business there in 1909 by opening a branch bank, and quit receiving any funds somewhere along in December, 1909, and finally closed out about February 24, 1910, up to which time the doors were open.

W. H. Smith or W. K. Smith, brother of Ector H. Smith, manager of the bank, went out before the branch was established, and I went around with him and a number of people agreed to take stock. W. K. Smith represented to us that the bank was doing a big business and making money, and the stock had risen from 100 to 125. These representations were made before they opened the doors. I was subsequently in Birmingham and had a conversation on the subject with Ector H. Smith, and neither at that time nor previously did he or W. K. Smith make any explanation of how the stock had been purchased or money borrowed from the Second National Bank of Cincinnati.

Neither they nor any other person informed me or the Fort Payne people, all of whom I represented, of anything bearing on the question of having had the bank stand responsible for the individual debts of Ben T. Head or any of the directors of the Bank.

None of our stockholders were consulted with concerning the making of the transfer of the Alabama Trust & Savings Company to the City Bank & Trust Company at any time, and we did not know anything about it. Never had any information of the terms of the transfer of the Alabama Trust & Savings Co. to the City Bank & Trust Company, nothing only just rumor that that bank had absorbed this other one.

(Here the witness was shown Exhibit 6 to the Amended Bill in this suit.)

I never knew anything about any of this, and the first time I ever heard of any of it is now while I am reading it.

(Witness is here shown Exhibit 3 to the bill in this suit as amended, and says:)

I never heard of this before. Our bank up there was not a branch bank until after October 10, 1908. My recollection is that the Fort Payne stockholders paid out some thirty odd hundred dollars for stock.

191 Cross-examination:

Before I bought my stock, I came to Birmingham and interviewed a few people and could not find anybody that knew much about the bank, the stock was bought on their representations, and all the information I got was from the Bank itself.

In December, 1909, after hearing that the City Bank & Trust Company had taken over the Alabama Trust & Savings Company, I came to Birmingham. I had written Mr. Head a time or two and still didn't get any information, and so I went to the Bank and asked Mr. Head. He said there were some dealings pending between the two banks, but he was out of it and that they were creating a new organization and that some gentleman was succeeding him as President whom he introduced to me as President of the City Bank and Trust

Company. That bank was open, but I do not know whether they were doing any business then for the Alabama Trust & Savings Company whose offices I could not find at that time. I was introduced to a man, I believe his name was Webb, and I told him what I had come for, and he said something about it would be delayed, but after a little it would be fixed. That was in the latter part of December.

I knew nothing about the transfer of the Alabama Bank to the City Bank until after it was done. I made no objection; that is, I did not know anyone to object to.

Witness C. P. CHABBERT, called for plaintiff, testified:

Direct examination:

The certificate of deposit attached to my proof of claim, before me, in the case of Kate Rowland v. The Alabama Trust & Savings Co., dated October 29, 1909, payable to the order of Ed. Chamberdon, in the sum of $1,500, payable 12 months after date is original certificate issued by Alabama Trust & Savings Co., through A. J. Thompson, its cashier, at the Oakman, Ala., branch. I acted for Ed. Chamberdon, and paid into that branch $1,500 in cash and received the certificate of deposit. Nothing has ever been paid on it. After the certificate was issued, they sold out to the Union Bank & Trust Company, with which I never had any transactions, and I never knew anything about what the Alabama Trust & Savings Co. did with its property and assets.

Oakman is a small town of about 750 or 800 inhabitants, 48 miles west of Birmingham.

192 Cross-examination:

I asked the cashier about the change to the Union Bank and Trust Company, and he said that they had changed the name of the Bank.

Witness G. M. RISER, called for plaintiff, testified:

Direct examination:

My name is G. M. Riser; I now live and have lived at Childersburg, Alabama, for about fifteen years and am uncle to Julia Riser, aged 13 years, and A. O. Riser, Jr., aged 17 years. I purchased stock in the Alabama Trust & Savings Co. for them along in the spring or early summer of 1909. I purchased one share for myself of the par value of $100 for $125, and the transaction was at Childersburg with Edgar H. Smith or his brother W. K. Smith. Both were over there.

The purchasers of these certificates of these minors were represented by their father A. O. Riser.

Childersburg is a place of about 600 people, 42 miles from Birmingham.

(Witness examines Exhibit No. 3 to the original bill in this suit.) This is the first time I ever heard of it.

(Witness is asked to examine Exhibit 6 to the bill of complaint in this suit.) I never heard of it before the present time. The person

who sold the stock to me in 1909 did not give me any information or intimation of the substance of this Exhibit 3 relating to the authority given the Second National Bank of Cincinnati to charge off against that $100,000 note of Ben T. Head.

Cross-examination:

I never saw any of the books or papers of the Alabama Trust & Savings Company nor made any inquiry about them. I had no connection with that Bank as director or officer. None of the officers of the Second National Bank of Cincinnati ever made any representations to me of any kind.

I do not know when the Bank ceased doing business, but I think it was about the first of February, 1910.

Redirect examination:

I have examined my claim as a stockholder filed in the Kate Rowland case for one share of stock for which I paid $125 about the third of February, 1909, and that is the certificate of stock that was then issued to me. Mr. A. O. Riser, my brother, got a check at the store for $250 to pay for the two shares for his children.

193 I am acquainted with the signature of F. C. Curl, who was cashier of the bank at Childersburg.

(At this point the witness is shown claim No. 16 filed in the case of Mrs. Kate Rowland, with a certificate of deposit attached, dated 7/3/09, and asked if that is in the handwriting of Mr. Curl?

A. Yes sir, that is his writing. He was cashier at the time this certificate bears date.

(Here plaintiff offers the certificate of deposit dated Childersburg, Ala., 7/3/09, issued to Mrs. Kate Rowland for $243.70 payable 12 months after date with interest at 5% per annum.)

(Here the witness is shown Claim No. 17 in the case of Mrs. Kate Rowland against the Alabama Trust & Savings Company, and will ask you to examine that. (Hands witness paper.)

"A. Yes sir, that is his signature.

"It is hereby agreed between counsel for plaintiff and defendant that the two proofs of claim Nos. 16 and 17, in the case of Mrs. Kate Rowland vs. Alabama Trust & Savings Company be attached as exhibits to the testimony of this witness, marked Exhibits Nos. "H" and "I" to said deposition of said witness, to be later returned from the United States Court at Cincinnati to the State Court in Birmingham."

These exhibits are two certificates of deposit issued by the Alabama Trust & Savings Co. as follows:

Issued to—	Date.	Amount.	Payable.
Kate Rowland	7/3/1909	243.70	12 Mos. after date with interest at 5% per annum.
Frank Matson	July 16, 1909	30.00	12 Mos. after date with interest at 5% per annum.

Recross-examination:

I never saw these certificates issued for Frank Matson and Mrs. Kate Rowland and don't know who issued them. I know the two signatures were written by the same party, for he kept books for me for three or four months after the bank failed, and I know that F. C. Curl wrote both of these.

I do not know what was paid for those certificates.

I do not remember that subsequent to September 27, 1909, the Alabama Trust & Savings Co. of Alabama was not in business. I made no investigation about that, nor of the assets and liabilities of that Bank, either at Birmingham or at Childersburg.

194 Witness W. A. BROWN, called for plaintiff, testified as follows:

Direct examination:

I am forty years old and have lived at Edwardsville, Alabama, all my life. Some time in June, 1909, there were negotiations at Edwardsville for the sale of stock in the Alabama Trust & Savings Co. I bought five shares of the stock and paid $625 for it, the negotiations being with W. K. Smith of the Alabama Trust & Savings Co., who lived at Birmingham. That was April 5, 1909, at Edwardsville.

He represented to me that the stock was worth and was being quoted at $125 a share. He said that they wanted to establish ten branches, and that they were doing that to get an outlet for what they had, and the more money they could use there at that bank, the better it would be for them.

I never had any information until just now of the matter contained in Exhibit 3 to the original bill now shown me, nor of Exhibit 6 to the original bill now shown me, nor anything of that nature until today.

Edwardsville is a place of about 300 inhabitants, 88 miles from Birmingham.

Cross-examination:

I do not know whether the assets of the Alabama Trust & Savings Co. were transferred or not. I do not know what was done with the assets of the Bank at Birmingham. Nobody but Smith ever talked to me about buying the stock before I bought it. No one connected with the Second National Bank of Cincinnati ever said anything to me about it.

Witness Dr. W. E. QUINN, recalled, examined by attorneys for defendant, testified:

I made a note for $400 to the Bank at Fort Payne, due January 1, 1910, and I paid it in full either to the Bank or to the Receiver of the Union Bank & Trust Company, J. B. Cobb. I never paid any money to the Second National Bank of Cincinnati but I paid every cent I owed.

Witness W. C. STERRETT, called on his own behalf, testified:

Direct examination:

There has been no receiver of the Alabama Trust & Savings
195 Company but myself. I have no personal or individual interest in this controversy and was never served with any process in any way or in any proceeding of Garber, Attorney General, against the Alabama Trust & Savings Company pending in the Chancery Court of Jefferson County, Alabama. I am not acquainted with any of the proceedings in that case, except only having made application to have books and papers of that bank turned over to me. I know in a general way when the Alabama Bank discontinued its business. At that time the City Bank & Trust Company was doing business in Birmingham. The character of the bank and of the men at the head of it, and their general reputation was not good.

They had made application to enter the Clearing House, and the Clearing House declined to admit them on account of its bad reputation.

Cross-examination:

The City Bank & Trust Company succeeded to the business of the Alabama Trust & Savings Company. (I did not know it at the time except as a matter of common knowledge.) I saw in the newspaper that the City Bank & Trust Company had taken over the business of the Alabama Trust & Savings Company.

Mr. George Huddleston was my attorney as receiver. I do not know how I came to be appointed receiver. I do not know what was the reputation of the City Bank & Trust Co. and the Alabama Trust & Savings Company in September, 1909, outside of the City of Birmingham.

Counsel for defendant offers in evidence the petition of W. C. Sterrett, Receiver, in the case of Alex. M. Garber as attorney general, against the Guarantee Bank in the Chancery Court of Jefferson County, Alabama, filed June 14, 1911. (The material part of said petition consists in the asking for an order that Edward D. Smith as Receiver of the Guarantee Bank show cause why he should not surrender the books of the Alabama Trust & Savings Company to him as its receiver.)

Also the answer of E. D. Smith, receiver of the Guarantee Bank & Trust Company. The material part of said answer is in saying that he had in his possession and under his control certain books of account which appear to have been the books or a part thereof, used by the Alabama Trust & Savings Co. at the time it was transacting business in the City of Birmingham, and that he had declined to surrender said books to said Sterrett as Receiver, but submits himself to the orders of the court;

Also the order of the court in the Guarantee Bank case, dated July
1, 1911. The material part of said order consists in the order-
196 ing that said Receiver Sterrett's petition be granted and that said E. D. Smith as Receiver of the City Bank be required to turn over to him the books of account in his possession kept by said Alabama Trust & Savings Company.

It was here admitted that the bill in the Alex Garber as attorney general case was filed October 5, 1910.

I did look at the books and records of the Alabama Trust & Savings Company at different times, but made no investigation of them, leaving that entirely to Mr. Huddleston my attorney. I received from J. B. Cobb as Receiver of the Union Bank & Trust Company $5,000 in settlement of some matter which was attended to by my attorney. I do not know whether any proceedings or suit was brought to collect it, nor for what the $5,000 was paid.

I have no knowledge of any of the representations made by the officers of the Second National Bank of Cincinnati to the officers of the City Bank & Trust Company or the officers of the Alabama Trust & Savings Company.

Of my own knowledge I do not know of any fraudulent acts in the organization of the City Bank & Trust Company. The facts set forth in my amended bill were worked up by my attorney.

As Receiver of the Alabama Trust & Savings Company I collected $6,000 of which $5,000 was from Mr. Cobb, Receiver of the Union Bank & Trust Company.

It is here admitted that the other thousand dollars was in the matter of the settlement by agreement, the material part of which is paragraph 4 set out at length, supra, page — of this record.

I collected no other money as receiver of the Alabama Trust & Savings Company.

Attorney for plaintiff showed witness sheet purporting to be statement of Alabama Trust & Savings Company of September 27, 1909, and asked the question:

"Q. I call your attention to a statement of the Alabama Trust & Savings Company of September 27th, 1909, and ask you to tell us what that statement shows as to the amount due the Alabama Trust & Savings Company of Birmingham from those several branches?

"A. In answer to that question I offer the original sheet in evidence."

Plaintiff's attorney then offered the sheet in evidence as Exhibit M to this deposition, to the offer of which attorney for defendant objected.

Said Exhibit M shows the following:

197 Liabilities.

Capital Stock	100,000.00
Discount & Interest	12,345.27
Deposits, including certificates and savings	270,932.66
Bills Payable	51,159.42
Owing Banks other than branches	25,690.06
Owing branch banks	3,948.48

Contra.

Cash	4,851.50
Exchange	996.57
Stationery account	1,828.27

Rents	1,830.50
Goodwill	9,000.00
Stocks and Bonds	45,500.00
Furniture and fixtures	9,184.84
Current expense	16,763.10
Loans and discounts	68,778.95
By Second National Bank of Cincinnati	18,493.51
By Other Banks	37,383.85
By Branch Banks	49,466.86

Said sheet also has written at the top the words:

"as transferred to books of City Bank & Trust Company September 27, 1909."

Redirect examination:

I have never received any notes, bonds, securities, bills receivable or other documents or securities of the Alabama Trust & Savings Company. I never knew a bank to carry "Good will" as an asset.

Witness CHARLES H. ABBOTT (again examined) testified:

Direct examination:

I was employed by E. D. Smith, receiver of the Guarantee Bank & Trust Company to audit the books of that Bank immediately after his appointment as receiver in August, 1910, and was engaged in that examination something like one month, and had access to its records, by which I mean all their books and accounts which the receiver practically turned over to me.

My investigation brought within its scope an effort to find out from those records and documents the circumstances concerning the organization of the City Bank and Trust Company.

The Guarantee Bank was the same bank under a different name, and their records were continuous one with the other. I have
198 in my possession carbon copy of letter dated December 29, 1908, addressed to Mr. G. W. Williams, Cashier Second National Bank of Cincinnati, reciting the enclosures of 14 checks amounting to $100,000 for the credit of said Bank, the City Bank & Trust Company of Birmingham, and also statement of account with the City Bank of Birmingham, showing credit to the latter on December 31—the year not shown—amounting to $100,000.

The plaintiff offered said copy of letter in evidence and made it an exhibit. The material part of said exhibit reads as follows:

"We enclose for credit of the City Bank & Trust Co. of Birmingham, Ala., the following items, viz:

R. C. Head, Agt., on you	$75,400.00
Other items aggregating	24,600.00
	$100,000.00

From my investigation of those records and correspondence, I found that R. C. Head, Agent, gave a note December 29, 1908, signed by himself, B. T. Head, and J. S. Head, Jr., for $74,500.00, which was held or owned by the Second National Bank of Cincinnati, and that from the investigation of items making up the $100,000 capital stock of the City Bank & Trust Company, there was only $1,100 actual bona fide cash payment.

I found among those records a letter from Thomas Boggess, Jr., written on the letter-head of the Citizens Bank & Trust Company at Ashland, Ky., dated from the Grand Central Depot, Cincinnati, January 1, 1909, and addressed to Ben T. Head, President of City Bank & Trust Company, Birmingham, Ala. Witness produces the letter and plaintiff offers it in evidence, the material part of which reads as follows:

"I believe you should call a meeting of your directors tomorrow (Saturday) and pass the resolution as per request of Mr. Williams of the Second National Bank, Cincinnati, Ohio. I approve of it, and you will find the Second National Bank will not take any advantage of our bank in any way but will give their support. I would take up the placing of the stock at once. I will write you on my arrival home.

"I will write Mr. Williams tonight so he will receive it tomorrow morning, as I have only a few minutes here and not time enough to go over to the bank to see him."

I have the minute book of the City Bank & Trust Company, showing meeting of the Board of Directors January 4, 1909.

199 Plaintiff offers minutes of said meeting in evidence. The material part of it reads as follows:

"At a meeting of the Board of Directors of the City Bank & Trust Company of Birmingham, Ala., this day, January 4th, 1909, the following directors being present (naming them) the following resolution was passed:

"That we hereby authorize the Second National Bank of Cincinnati, Ohio, to charge to our account, at any time that it appears to them that it is to their interest to do so, the note of R. C. Head, Agent, of $75,400.00, or any part of it that may remain unpaid at the time."

"Motion carried unanimously."

I have found and produce carbon copy of letter dated January 4, 1909, addressed to G. W. Williams, Cashier, Cincinnati, Ohio, enclosing that resolution, with a carbon copy of the resolution which was enclosed with the letter.

The plaintiff offers in evidence said carbon copy of the letter and also carbon copy of the resolution just set out. The material part of the letter reads as follows:

"As per your request I enclose you herewith resolution adopted by the Directors of the City Bank & Trust Company, held this day. If this does not meet with your approval please send me a copy of the form you want and we will gladly conform to your wishes."

I have found among the records of the Guarantee Bank & Trust Company and now have in my hands a letter dated January 6, 1909, on the letterhead of the Second National Bank of Cincinnati, signed by G. W. Williams, Cashier, to Ben T. Head, President City Bank & Trust Company of Birmingham, Ala.

Plaintiff introduces letter in evidence; the body of which is as follows:

"I have your favor of the 4th inst., enclosing resolutions of your Directors covering $75,000 note. I notice you have omitted putting seal of the bank on the resolution. However, we will not return it for that purpose.

"I also received your letter concerning the severing of your connection with the Citizens Savings Bank and note Mr. Brannon will be in charge. I was writing you today concerning their collateral, which is more or less irregular being past due, but upon receipt of your letter I deferred the matter until tomorrow when I will write Mr. Brannon, which I trust will be satisfactory.

"Hoping your efforts will prove successful in the interest of your new institution, and with personal regards, I beg to remain."

The records of the City Bank & Trust Company show how much was credited upon this Head note from different sources, but it is quite difficult to tell how much was from stock sales, how much from cash collections, and how much by a mere transfer of the indebtedness from the Second National Bank of Cincinnati to the Birmingham Bank. There is a credit on the note dated January 18, 1909, of $1,000 from Ben T. Head, and a credit December 18, 1909, of $100 from M. Head. From these records you can not definitely tell the manner of the payments.

200

I examined quite a number of the records of the Alabama Trust & Savings Company which I found with the records of the Guarantee Bank & Trust Company. The records of the latter bank show that it opened for business January 6, 1909, and that it took over the business of the Alabama Trust & Savings Co. Sept. 27, 1909, at which time it appeared from the books of the Alabama Trust & Savings Company that there was due the bank upon accounts and bills receivable, $268,778.95, and the books of the City Bank & Trust Company show, as received from the Alabama Trust & Savings Company on the same date $243,259.06 showing a discrepancy of $25,519.89 of which there is no account.

From my investigation of the records of the City Bank & Trust Company, as accountant and auditor, I will say that it was insolvent from the beginning, using as the beginning the time before it opened its doors for business, and it was insolvent continuously until it went into the hands of a receiver.

From my investigation of the records of the transactions of that Bank with the Second National Bank of Cincinnati, as expert accountant I would say that the officers of the Second National Bank of Cincinnati were familiar with its affairs almost to the minute details, and with such knowledge they must have known of its insolvency from the beginning.

Counsel for defendant moves to strike out this testimony as being

a conclusion of the witness and on the ground that no records have been produced by the plaintiff showing any such knowledge and that it has not been stated what knowledge the directors had.

At the time of the taking over of the assets of the Alabama Trust & Savings Company by the City Bank & Trust Company, there were not included in that transaction two certificates of deposit for $5,000 each, which were issued to Gus. T. Brannon and Ector H. Smith.

When the Receiver of the Guarantee Bank & Trust Company was appointed there were unpaid loans due from its directors and
201 other allied interest amounting to $59,321.90, and the following individuals owed it at that time:

Ben T. Head, $5,072.10. J. S. Head and Ben T. Head, $13,796.20. Ben T. Head, overdrawn, $170.34. Brannon & Head, $680.83. Ben T. Head, all together, including what has been stated, $42,185.30. None of which has ever been paid.

The records of the Guarantee and City Bank & Trust Company show that Ben T. Head's connection with the Bank was continuous during the time it did business.

The records of the City Bank show that Ector H. Smith was paid $2,500 salary for his services conditioned upon his resigning the Vice-Presidency of that Bank October 12, 1909. And the records show that the money was paid him.

My acquaintance with the affairs of the Alabama Trust & Savings Company having begun after my connections with the receiver for the Guarantee Bank & Trust Company, about 14 months after the absorption of the Alabama Trust & Savings Company, gave me an opportunity to see the large amount of past due and apparently uncollectible assets which had belonged to the Alabama Trust & Savings Company, and from that point of view I should say they were hopelessly insolvent on September 25th, 27th, 1909; and further, taking into consideration the stock notes amounting to something over $80,000, issued by the Bank and endorsed by individuals and held by the Second National Bank of Cincinnati, which alone were sufficient to force its insolvency, provided all its other affairs were in good shape,—meaning by its other affairs that those bills receivable were all collectible, and its assets were good and realizable.

Unquestionably the mere execution of the notes for $82,400.00 or some such sum, by the Bank on account of or in lieu of individual liability of its directors or other persons in that amount would alone and of itself have created an insolvency with a bank of $100,000 capitalization.

As to the Guarantee Bank & Trust Company, if the $75,200.00 Head proposition had been wiped out as a liability of the City Bank & Trust Company soon after it started, this contingent liability of the Alabama Trust & Savings Company of over $80,000.00 to the Second National Bank of Cincinnati would have been an overwhelming blow for it in September, so that the insolvency of the City Bank & Trust Company would not depend alone on the Head note, or its loss in operations.

"Q. In other words, if honestly and in good faith the entire
202 capital stock of $100,000.00 of the City Bank & Trust Company had been paid in full in money, and that Bank, under

the circumstances which existed September 25th, 27th, 1909,—if the affairs of the Alabama Trust & Savings Company, assuming this $84,200.00, or such portion thereof as remained to stockholders' liability, had been assumed in the transaction by the City Bank & Trust Company, would not that alone have wrecked the City Bank & Trust Company?"

Counsel for defendant objects to the question as being immaterial as to the insolvency of the City Bank & Trust Company on September 27th, 1909, for the further reason that it asks for a pure conclusion, which in our opinion the Court should determine in this case, and not this witness.

"Q. I will ask you that from your experience and as a bank accountant on such matters?

"Counsel for defendant makes the same objection.

"A. Yes sir."

As of September 27, 1909, the books of the Alabama Trust & Savings Company show they had a loss of $74,480 irrespective of bad or doubtful loans.

Cross-examination:

"Q. Mr. Abbott, near the beginning of your testimony you testified, I believe, that the City Bank & Trust Company was never solvent at any period of its existence, even before it opened its doors to do business. I will ask you, Mr. Abbott, if the City Bank & Trust Company did not have in cash, or on deposit with other solvent banks, $100,000.00 at the time it started business?

"A. It had to its credit with the Second National Bank of Cincinnati on December 31st, 1908, according to a statement furnished by that bank, but it had a liability of $75,400.00 against that $100,000.00, which they had created by resolution of its board of directors December 29th, 1908, authorizing the Second National Bank of Cincinnati to charge all or any part of that amount, at its discretion, to the account of the City Bank & Trust Company. If it had $100,000.00 capital paid in, it had a $75,400.00 string tied to it."

At that time it had no creditors but the stockholders and its contracts for furniture and fixtures, including safes and lease on a building and its own organization expenses.

The only reason I testified that it was insolvent at the time of its organization is because of the fact that the resolution was passed that the Second National Bank of Cincinnati could charge back that $75,400.00 note.

203 If that note had not been a liability, and their $100,000.00 capital had been paid in, they would have been solvent.

The accounts of the Alabama Trust & Savings Company and the City Bank & Trust Company were amalgamated on the general books, but the individual accounts were not, and the accounts, as I remember, of individuals with the Alabama Trust & Savings Company were not amalgamated or taken over into the individual books of the City

Bank & Trust Company until those accounts became active with th
City Bank & Trust Company.

And the records of the City Bank & Trust Company were there
after kept as if they were the assets of one bank.

And from my point of view it seemed that all the assets of the tw
banks were amalgamated from the time of the absorption of the Al
bama Trust & Savings Co.

The General Ledger of the Alabama Trust & Savings Compan
showed on September 27, certificates of deposit amounting to $78
991.62, but I am not able to say how many certificates of deposit wer
in existence at the time I took possession of the books. I made
statement to the Receiver that there were three certificates of depos
outstanding, issued by the Alabama Trust & Savings Company, one
the Tuskegee Land & Securities Company, one to the Security Li
and Accident Company for $3,000, and one to Rev. James Clarendo
for $15.

I find that on November 16, 1909, the directors of the City Bank
Trust Company passed resolutions as shown by their minutes.

Defendant here offers record of minutes containing resolution
which reads as follows:

"Record of Minutes of Directors' Meeting, Nov. 16, 1909.

At a meeting of the Board of Directors of the City Bank & Tru
Company, held in their banking room on the 16th day of Novembe
1909, at three P. M., the following were present:

T. J. Carson, B. F. Barbour, B. T. Head, A. S. Smith, John W
Worthington.

The following resolutions were adopted:

Resolved, That whereas J. W. Worthington, President, thereun
duly authorized did on the 13th day of November execute on beha
of the City Bank & Trust Co., a certain instrument of guaranty to th
Second National Bank of Cincinnati, as follows, to-wit:

(Copy.)

" 'Be it resolved, that the Board of Directors of the Ci
204 Bank & Trust Co., do hereby ratify and approve said agre
ment of guaranty as fully and completely as if said agreemen
had been authorized in the words and figures therein set out prior
its execution hereby confirming and ratifying the authority previo
given to said J. W. Worthington, President to execute such instr
ments as might be necessary to secure said loan, and do hereby decla
said contract to be the binding obligation of said the City Bank
Trust Co.

"In consideration of Ten Thousand dollars ($10,000.00) this da
loaned to the undersigned, the City Bank & Trust Co., and for oth
valuable considerations, said, the City Bank & Trust Company,
Birmingham, Ala., does hereby guarantee the payment of all oblig
tions of the Alabama Trust & Savings Company, and the Citizen
Savings Bank to the Second National Bank of Cincinnati, Oh
whether as maker or endorser and whether said obligations are no

due or to become due and do hereby ratify our agreement to assume all the obligations of the said Alabama Trust and Savings Company, and the Citizens Savings Bank to said the Second National Bank of Cincinnati, Ohio, and do hereby agree to save said the Second National Bank of Cincinnati, Ohio, harmless and free from loss on account thereof.' "

And also the record of the minutes of the directors of December 2, 1909, reading as follows:

"At a meeting of the Board of Directors of the City Bank & Trust Co., held in their banking rooms Thursday, Dec. 2nd, 1909, the following directors were present:

Ben T. Head, A. S. Smith, B. F. Barbour, W. E. Spink, Geo. M. Webb, T. J. Carson.

Motion made by W. E. Spink and seconded by B. F. Barbour, that the contract between the City Bank & Trust Company and the Union Bank & Trust Co., a copy attached hereto, be entered into and confirmed and the President or Cashier is hereby authorized to endorse City Bank & Trust Co. collateral referred to in said contract.

Carried.

The following is a copy:

" 'Whereas, under an agreement heretofore made by and between the City Bank & Trust Company, of the one part, and Ector H. Smith and associates, by which said bank agreed to turn over to a corporation to be organized by said Ector H. Smith and associates the various branch banks organized by the Alabama Trust & Savings Co., and which were turned over to said City Bank & Trust Co., to be liquidated with said Alabama Trust & Savings Company under a contract which is referred to as above stated.

205 " 'And whereas, said transfer of said branch banks is to be made this day and for the purpose of relieving said City Bank & Trust Co. from all liability and responsibility assumed by it, and in any way incurred by reason of taking under its charge said branch banks, it is hereby agreed as follows:

"The Union Bank & Trust Co., the corporation organized by said Ector H. Smith and associates in consideration of the turning over to it of said branch banks, agrees to take up all outstanding books of deposit, or certificate of deposit now issued and outstanding by said branch banks in the name of the Alabama Trust & Savings Co., or the Citizens Savings Bank, and to issue in lieu thereof the book and certificates of the Union Bank & Trust Company, and to relieve and release the said City Bank & Trust Company from all liability to said depositors or other creditors of said branch banks; and the said Union Bank & Trust Co. agrees to make said exchange of books and etc. as rapidly as possible, and to make monthly reports to the City Bank & Trust Co., showing the transfer made during the previous months.

"The City Bank & Trust Company agrees to substitute for the collateral of said branch banks, now held by the Second National Bank of Cincinnati, Ohio, or other banks, its collateral and secure the release of the collateral of said branch banks, and to turn over the same to said Union Bank & Trust Co., said collateral held by said Second National Bank amounting to about $30,000.00 should the same be more or less the full amount shall be made up and should it

be less the excess shall be returned to the City Bank & Trust Co. a list of substitute collateral and a list of the notes due the Union Bank & Trust Co., belonging to the branch banks is hereto attached.

"The City Bank & Trust Company shall have the privilege at any time of substituting collateral for those this day put up with collateral satisfactory to said Union Bank & Trust Company.

" 'In testimony whereof, we, the City Bank & Trust Co., said Union Bank & Trust Co., and Ector H. Smith and associates have hereunto set their hands this 2nd day of December, 1909.

"UNION BANK & TRUST COMPANY,
"ENOS R. STEWART, *Vice-President.*
"ECTOR H. SMITH & ASSOCIATES.
"CITY BANK & TRUST COMPANY,
By E. C. DUNN, *Cashier.*

" 'We hereby sell, transfer and assign to Union Bank &
206 Trust Co. the furniture and fixtures of the Alabama Trust & Savings Company, now owned by us; also transfer the lease on building formerly occupied by the Alabama Trust & Savings Co., for consideration of $9,184.84 Nine Thousand One Hundred and Eighty-four Dollars and eighty-four cents.

"Said sum to be paid to City Bank & Trust Co., when notes of branches are delivered to Union Bank & Trust Co.

"CITY BANK & TRUST COMPANY,
By E. C. DUNN, *Cashier.*

"A list of notes held in file.

"GEO. M. WEBB,
President.

"E. C. DUNN, *Secretary.*

"Meeting continued."

I examined the General Ledger and Cash Book of the City Bank & Trust Company and found the various items constituting the balance of $52,891.70 charged to the Alabama Trust & Savings Co. The nature of the charge making up that amount seems to have been the discharge of liabilities of the Alabama Trust & Savings Company in the matter of rents of two buildings in Birmingham, the payment of attorneys' fees, the payment of balances due the Third National Bank of Louisville and the Second National Bank of Cincinnati, but the adjustment of the accounts between those banks and the Alabama Trust & Savings Company, interest on savings deposits of the Alabama Trust & Savings Company which had not been calculated at the time of the merger, a note of the Interstate Securities Company for $8,000.00 and two notes of C. H. Bowden, or rather C. H. Bowles, for $5,000 each and a number of similar items.

I have no way of determining whether or not they were actual liabilities undischarged by the Alabama Trust & Savings Company, but my presumption is such; from my examination they appear to be such liabilities, in addition to the liabilities as shown by this statement of September 27, 1909.

The correspondence between the Second National Bank of Cincinnati and the City Bank & Trust Company and its officers and the Guarantee Bank & Trust Company and its officers was frequent and voluminous, and from that correspondence it was easy to determine their familiarity with the affairs of the Birmingham Bank.

"Q. Mr. Abbott, I will ask you whether from the records it appeared that the Second National Bank of Cincinnati participated actively in the organization of the City Bank & Trust Company?

"A. It certainly did.

207 "Q. What records show that, Mr. Abbott?

A. The minutes of January 4th, 1909, which show that the Board of Directors of the City Bank & Trust Company authorized the Second Nat-onal Bank of Cincinnati to charge to the account of the City Bank & Trust Company at any time it saw fit all or any part of a note of R. C. Head, agent, for $75,400.00.

"Q. Is that the record upon which you make the statement that they participated in the organization of that bank?

"A. Yes sir.

"Q. The City Bank & Trust Company and the Alabama Trust & Savings Company at that time were in no way connected were they, Mr. Abbott?

"A. Not on the books."

The records of the City Bank & Trust Company do not show what knowledge the officers of the City Bank & Trust Company had of the Alabama Trust & Savings Company.

The full books and records of the Alabama Trust & Savings Company were not in the possession of the receiver of the City Bank & Trust Company when I begun my employment with him, and I can not determine from the records what statement and the full correspondence was passed between the Second National Bank of Cincinnati.

I did not find on the books of the Alabama Trust & Savings Company, as far as my investigation went, any notice of irregular or fraudulent acts on the part of the officers of Alabama Bank given to the Second National Bank of Cincinnati. But the payments of unusual amounts of interest charges, and statements furnished by the Second National Bank showed that the Second National Bank of Cincinnati held notes of the Alabama Trust & Savings Company amounting to more than $80,000 endorsed by parties interested in the Alabama Trust & Savings Company. In checking the transfer from the Alabama Trust & Savings Company to the City Bank & Trust Company on September 27th, 1909, I found a balance due from the Second National Bank of approximately $18,000.00 was not listed in the items transferred. Upon investigating this account I found that such of the amount as the Second National Bank of Cincinnati had found to be a balance to the credit of the Alabama Trust & Savings Company with them had been confiscated to the amount of $17,200.00 and applied on the notes given to it by the Alabama Trust & Savings Company, $10,000 having been applied on a note endorsed by Gus T. Brannon, and $7,000 on a note endorsed by W. K. Smith.

208 I found from the statements rendered by the Second National Bank of Cincinnati that bills receivable of the Alabama

Trust & Savings Company for a large amount, covering more than $100,000 had been taken by the Second National Bank of Cincinnati as collateral to the stock notes; meaning by the stock notes, the notes amounting to more than $80,000 made by the Alabama Trust & Savings Company and endorsed by the various parties interested, who were either its stockholders or its directors and officers.

The note of George M. Webb for $50,000, given to the Second National Bank of Cincinnati, was applied by the Second National Bank of Cincinnati to the extinguishment of that much of the debt due by the City Bank & Trust Company.

As to whether or not the City Bank & Trust Company paid more obligations of the Alabama Trust & Savings Company than realized out of assets taken over, could only be a conclusion of mine, as I made no comparative figures. Assets and liabilities of both concerns were commingled after the amalgamation, and it would have been a difficult proposition to be certain in aligning the receipts or payments of each concern's affairs prior to the amalgamation.

Defendant offers in evidence record of minutes of the Board of Directors of the City Bank & Trust Company, September 27, 1909, which read as follows:

"Record of Minutes of Directors' Meeting, Sept. 27th, 1909.

Continued meeting of the Board of Directors of the City Bank & Trust Company held in the banking rooms Sept. 27th, 1909, at three P. M., was called to order, and the following directors were present:

Ben T. Head, W. E. Spink, T. J. Carson, Geo. M. Webb, Ben F. Barbour, R. A. Brown, J. W. Worthington.

Mr. Ben T. Head voluntarily offered his resignation as President of the Bank and the same was accepted to take effect today, Sept. 27th, 1909.

On motion of Ben T. Head seconded by Geo. M. Webb, Mr. J. W. Worthington was elected President of the City Bank & Trust Company to take effect at once on this the 27th day of September, 1909. Mr. Worthington being present he qualified as president and took the chair.

On motion of W. E. Spink, seconded by T. J. Carson, Mr. Ben T. Head was unanimously elected First Vice-President of the Bank.

On motion of Mr. B. T. Head, seconded by Ben F. Barbour,
209 Mr. E. H. Smith was elected Second Vice-President of the Bank at a salary of $2,500.00 per annum.

On motion of B. T. Head, seconded by Geo. M. Webb, Mr. E. C. Dunn was elected Assistant Cashier of the Bank.

On motion of George M. Webb, seconded by W. E. Spink, Mr. J. E. Shelby was elected a member of the Board of Directors of the City Bank & Trust Co.

On motion of W. E. Spink, seconded by R. A. Brown, that a vote of thanks be extended to Mr. Head for his faithful services as president of the Bank.

On motion of Ben F. Barbour, seconded by W. E. Spink, that we confirm the proposition for the liquidation of the Alabama Trust &

Savings Co., and that the following resolution be spread upon the minutes:

"'At a meeting of the directors of the Alabama Trust & Savings Co., to merge the two banks by the liquidation of the Alabama Trust & Savings Co. (a copy) herewith attached to their proposition was accepted, and we hereby transfer entire assets of this bank to the City Bank & Trust Co., as a protection for the assumption of the depositors and liabilities.'

(Signed) ALABAMA TRUST & SAVINGS CO.,
ECTOR H. SMITH,
V.-President & Director.
TOM STOBERT, *Cashier & Director.*
J. E. SHELBY, *Director.*

On motion of Ben F. Barbour, seconded by Geo. M. Webb, that the Board of Directors hereby authorize the increase of the capital stock of the bank to Two Hundred Thousand Dollars at any time that it may be deemed advisable to do so, and that Mr. J. W. Worthington be given an option to purchase this increase of stock at par when the increase is made.

On motion of Ben F. Barbour, seconded by T. J. Carson, that the President, J. W. Worthington, 1st Vice-President, Ben T. Head, Asst. Cashier be authorized to sign all documents necessary to the speedy transaction of the business of the Bank, consisting of drafts, bills of exchange, letters of credit and such other documents as the Board of Directors may from time to time authorize.

On motion of Geo. M. Webb, seconded by T. J. Carson, that the President, Mr. J. W. Worthington have entire charge of the affairs of the Bank.

On motion of W. E. Spink, seconded by Ben T. Head, that Mr. J. W. Worthington be allowed $3,000.00 for expenses incurred as compensation for his services rendered to date for the City Bank & Trust Co.

On motion of T. J. Carson, seconded by W. E. Spink, that the President, Mr. J. W. Worthington, the Vice-President, Mr. B. T. Head, Ben F. Barbour, Geo. M. Webb, and R. A. Brown constitute the finance committee, to approve of all loans made by the Bank, except such as in the discretion of the President are wise to make.

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The meeting was continued until 11 A. M. tomorrow, Sept. 28th, 1909.

JOHN W. WORTHINGTON, *Pres't.*

R. A. BROWN, *Acting Sec'y.*"

"Alabama Trust & Saving- Co.

BIRMINGHAM, ALA., Sept. 27th, 1909.

At the meeting of the Directors of the Alabama Trust & Savings Company held this day the proposition of the City Bank & Trust Company to merge the two banks by the liquidation of the Alabama

Trust (a copy) herewith attached of their proposition was accepted, and we hereby transfer entire assets of this Bank to the City Bank & Trust Company, as a protection for the assumption of the depositors and liabilities.

ALABAMA TRUST & SAVINGS CO.,
ECTOR H. SMITH, *V. Pt. & Dir.*
TOM STOBERT, *Cashier & Dir.*
J. E. SHELBY, *Dir.*"

Also the minutes of the Directors of the City Bank & Trust Company of September 25, 1909, which read as follows:

"*Record of the Minutes of Directors' Meeting, Sept. 25th,* 1909.

Continued meeting of the Board of Directors of the City Bank & Trust Company held in their banking rooms Sept. 25th, 1909, at eleven a. m., there being no quorum present the meeting was continued until Monday, Sept. 27th, 1909, at eleven a. m.

BEN T. HEAD, *Pres't.*

R. A. BROWN, *Acting Sec'y.*

"*Record of Minutes of Directors' Meeting, Sept. 27th,* 1909.

Continued meeting from Saturday, Sept. 25th, '09, of the Board of Directors of the City Bank & Trust Co. in their banking rooms on Monday at eleven a. m. Sept. 27th, 1909, the meeting was called to order and the following directors were present:

Ben T. Head, Ben F. Barbour, T. J. Carson, Geo. M. Webb, W. E. Spink, R. A. Brown.

The minutes of Sept. 13th and 14th, and the continued meetings of the 15th, 16th, 17th, 18th, 20th, 21st, 22nd, 23rd, 24th and 25th were read and approved.

On motion of R. A. Brown, and seconded by W. E. Spink, that Mr. J. W. Worthington be elected a director. Motion carried. Mr. Worthington being present qualified as a director.

211 This agreement entered into this 25th day of Sept., 1909, by and between City Bank & Trust Co., and the Alabama Trust & Savings Co.

We proposed as follows:

$10,000.00 C. of D. and 12 mos. at 4%.

Elect Ector H. Smith, Vice President at $2,500.00 per annum.

Take over and liquidate the Alabama Trust & Savings Co., and assume its liability to depositors & Bills payable.

To maintain the branches of said bank in liquidation until January 1st, 1910.

Spencer at $150.00 Mo.

Lewis at $112.50 Mo. To go as long as desired. Dated Birmingham, Ala., Sept. 25-09.

Mr. Shelby, a Director. To take effect Sept. 27th, 1909, at two p. m.

CITY BANK & TRUST CO.,
By BEN T. HEAD, *President.*

And Committee: BEN F. BARBOUR.
BEN T. HEAD.
GEO. M. WEBB.
JOHN W. WORTHINGTON.

Accepted:

ALABAMA TRUST & SAVINGS CO.,
By ECTOR H. SMITH, *V. President.*

On motion of W. E. Spink, seconded by T. J. Carson, that the plan submitted by the Committee for the liquidation of the Alabama Trust & Savings Co., be accepted, and that the Finance Committee of this Bank, be authorized and empowered to carry out the details of said liquidation arrangements. Motion carried.

On motion of J. W. Worthington, seconded by Geo. M. Webb, the following resolution was unanimously adopted: 'It is the sense of the Board of Directors of the City Bank & Trust Co., that the stockholders be requested to pay an assessment of 10% on their stock in order that the charges for the expenses of the organization of the Bank be removed.' Motion carried.

On motion of Ben F. Barbour seconded by Geo. M. Webb, the following resolutions were adopted:

(1) Resolved: That the President or Vice President be and he is hereby authorized and empowered to borrow from the Second National Bank of Cincinnati, Ohio, the sum of Fifteen Thousand ($15,000.00) Dollars, and to pledge as collateral security for the payment of the loan such collateral of the City Bank & Trust Co. as may be necessary.

212 (2) Resolved: That the President or Vice President be and he is hereby authorized and empowered to borrow from the Hermitage National Bank, of Nashville, Tenn., the sum of Twenty-five Thousand ($25,000.00) Dollars, and to pledge as collateral security for the payment of the loan such collateral security of the City Bank & Trust Company as may be necessary.

(3) Resolved: That the President or Vice President be and he is hereby authorized and empowered to borrow from the Hudson Trust Co., of New York, the sum of Fifty Thousand ($50,000.00) Dollars, and to pledge as collateral security for the payment of the loan such collateral of the City Bank & Trust Co. as may be necessary. Meeting continued until 3 p. m. today, Monday, Sept. 27th, 1909.

———, *President.*

E. C. DUNN, *Acting Secretary.*"

"This agreement entered into this 25th day of September 1909, by and between City Bank & Trust Company, and the Alabama Trust & Savings Company.

We propose as follows:
$10,000.00 C. of D. and 12 months at 4%.
Elect Ector H. Smith, Vice Prest. at $2,500.00 per annum.
Take over and liquidate the Alabama Trust & Savings Company and assume its liability to depositors and bills payable.
To maintain the branches of said bank in liquidation until Jan. 1st, 1910.
Spencer at $150.00 per month.
Lewis at $112.50 per month. To go as long as desired.
Mr. Shelby, a director, dated Birmingham, Ala., Sept. 25th, 1909.
To take effect Monday, Sept. 27th, 1909, at 2 p. m.

CITY BANK & TRUST CO.,
By BEN T. HEAD, *Pres't.*
Committee: BEN F. BARBOUR.
BEN T. HEAD.
GEO. M. WEBB.
JOHN WORTHINGTON.

Accepted:

ALABAMA TRUST & SAVINGS CO.,
By ECTOR H. SMITH, *Vice President.*"

Defendant here offers in evidence the decree confirming the
213 receiver's and register's report in the case of Mrs. Kate Rowland, filed January 29, 1914, which, as far as may be material here is as follows:

Confirms the report of receiver showing balance of $805.28 in the receiver's hands, and all other property and assets which may be collected through the suit in equity pending in Cincinnati in the United States District Court for the Southern District of Ohio, in which Receiver W. C. Sterrett is complainant, and Second National Bank of Cincinnati is defendant shall be devoted and applied:

First, to the payment of unpaid costs which may have accrued and which may accrue in the chancery suit, not therein taxed against some other party; second, to the payment of any unpaid expenses or allowances of or for the administration of the estate of said Alabama Trust & Savings Company, after payment and deduction of attorney's fees of the receiver's attorneys in and about the said suit in the United States District Court, or as may be hereafter decreed in any other suit or proceeding which might be instituted to recover assets; third, pro rata to the payment of the respective balances of principal to the respective creditors, seven of whom are named, whose aggregate claims amount to $2,413.57, with interest at eight per cent. per annum from March 9, 1912; fourth, pro rata to 19 named creditors in respective amounts aggregating $13,032.22, with interest at the rate of 8% per annum from July 21, 1910, which amount of $13,032.22 includes the claim of Tuskegee Land & Security Company for $5,000; Fifth, after the said creditors are paid with interest as aforesaid, the balance shall be divided, distributed and paid to 34 named stockholders according to their respective shares which is stated, totaling 65, or to Edmund H. Dryer, their attorney of record for such stockholders.

Also an affidavit filed October 5th, 1910, in said Alex M. Garber, Attorney-General, case, the material part of which reads as follows:

"Before me, J. W. Altman, Register in Chancery, personally appeared L. P. Hosmer, assistant State Bank examiner of Alabama, who upon oath duly administered, deposes and says as follows:

"I am assistant State Bank examiner of Alabama, and in the course of my duties as such officer, receiving directions to do so by T. J. Cutledge, the State Bank Examiner of Alabama, I have heretofore on to-wit: June 15, 1910, and on different occasions since, officially examined into the affairs of the Guarantee Bank & Trust Company of Birmingham, Alabama, the last examination so made by me under the direction of the said State Bank examiner, was on to-wit, September 29, 1910.

"As the result of such official examinations by me made theretofore, and the result of a further official examination of September 29, 1910, I am very familiar with the affairs of the said Guarantee Bank & Trust Company and, I may say, have an intimate knowledge of the business of said bank, and its present financial condition. The said bank is unquestionably insolvent. I find said Bank carrying a very large amount of bad loans which are uncollectable, and a great number of past due notes, representing an amount of $100,000.00, a considerable portion of said amount being past due, as shown by my examination of the papers, from one to three years. One loan of $207,000.00 to W. H. Gregory has been so manipulated, that said loan of itself renders the said Bank insolvent. This alleged loan was made to W. H. Gregory and deposited in said Bank to the credit of the Citizens National Life Insurance Company, of Louisville, Ky., and then transferred to the account in said Bank of the treasurer of the said Insurance Company. The said Bank has nothing to show as security for this alleged loan, except a receipt from the insurance company for the said amount.

The books of said Bank show that the sum of $52,891.70 is due and has been due for a long time from the Alabama Trust & Savings Bank, which was merged some time ago into the City Bank & Trust Co., the latter, the said City Bank & Trust Company, being subsequently taken over by the said Guarantee Bank & Trust Company. The said sum of $52,891.70 is carried on the books of said Bank as an open account without security, and from my intimate knowledge of the affairs of the said Guarantee Bank & Trust Company, in my judgment, the said sum is worthless and the amount is uncollectable and has been so for a long time.

The books of the said Guarantee Bank & Trust Company also show the sum of $4,988.00 due from the National City Bank of Birmingham which institution has never been organized. The plan for the organization thereof was started about two years ago with abortive results up to this day. There is no such National Bank in existence in Birmingham or doing business therein as the National City Bank of Birmingham. The above amount represents a further positive loss on the books of the said Guarantee Bank & Trust Company.

In the stocks and bonds account, the said Guarantee Bank & Trust Company shows on its books that twenty-three shares of the Alabama Trust & Savings Bank, long since merged into the City Bank & Trust Company, are carried as an asset of the bank in the amount of $2,300.00. This said amount, in my judg-

ment, is absolutely worthless. The same is true of ten shares of the National Building Company of Birmingham, Alabama, carried on the books of said Bank at $1,000.00. My examination further shows that the said Guarantee Bank & Trust Company has sustained a heavy loss in the "Individual Ledgers" and the "General Ledger." The individual ledgers should balance with the general ledger, whereas they are short at least $4,000.00. On the 29th Sept., 1910, my examination of this Bank also revealed that the expense account of said Bank exceeded the profits by at lease $9,000.00 which shows clearly that the Bank is run at a loss.

The cash reserve required by law has not been maintained since June 15, 1910. The minimum cash reserve on hand September 29, 1910, required by law was $17,000.00, whereas on said date, the said Bank only had cash in vault in the amount of $1,957.04. This amount of minimum cash required by law is a mandatory requirement of section 3548 of the state statute.

From the foregoing statements which represent only in part the present bad status of the said Guarantee Bank & Trust Company, I state upon oath that the said Bank is hopelessly insolvent and should, in my judgment, be placed in the hands of a Receiver instantly. The purpose and intent of section 3560 of the code is clear to the effect that an insolvent bank should immediately be placed in the hands of a Receiver and its assets and property taken in charge for the equal protection of all of its creditors. Any delay would afford the officers of said Bank an opportunity to change its present status, divert its funds, prefer certain creditors and altogether destroy the very purpose of the statute.

(Signed) L. P. HOSMER.

Sworn to and subscribed before me this 5th day of October, 1910.

(Signed) J. W. ALTMAN,
Register in Chancery.

Defendant here offered in evidence Exhibit "A" to the answer of Defendant, which was filed June 29, 1914, this record, page —.

Additional Testimony Taken by Defendant at Cincinnati, Ohio, Commencing August 18, 1914.

JOHN G. GUTTING, formerly examined as a witness, being called as a witness for the defendant, says:

216 I reside at Cincinnati, Ohio, and am assistant cashier of the Second National Bank and have occupied all the positions in the Bank from messenger up to assistant cashier.

On July 12, 1909, we loaned the Alabama Trust & Savings Company $28,000, which was the only direct loan without anything but notes as collateral.

Payments were made upon this loan from collateral as follows:

August 6, 1909, note of P. A. Bowden	450.00
August 13, 1909, note of T. P. Perry	455.00
August 19, 1909, note of Huntsville Knitting Company	1,300.00
August 20, 1909, note of J. F. Godden, part payment on $200	50.00
August 20, 1909, note of H. T. Stacey	100.00
August 20, 1909, note of T. H. Hopkins	90.00
August 20, 1909, note of Chenowith	100.00
September 1, 1909, note of S. O. Griffith	300.00
September 14, 1909, note of F. L. McMahon	125.00
September 19, 1909, note of Carl Seals	52.00
September 24, 1909, note of E. W. Bell	100.00
October 1, 1909, note of P. J. Watson	300.00
October 1, 1909, note of C. A. Gourdon	50.00
October 1, 1909, note of Alabama P. & P. Co	400.00
October 12, 1909, note of Tyler	1,475.00
October 13, 1909, note of Vincent Mercantile Co	2,080.00
October 13, 1909, note of E. W. Bell	100.00
October 13, 1909, C. D. Ebersole (Note due Sept. 27)	1,500.00
October 13, 1909, Same (Note due Sept. 26)	160.00
October 13, 1909, note of W. C. Chancellor	266.62
October 13, 1909, note of Bird, Corbin Co	250.00
October 27, 1909, note of Wm. Miles	200.00
Nov. 4, 1909, note of A. D. Smith	250.00
Nov. 10, 1909, note of B. A. Alfred	998.00
Nov. 11, 1909, note of Bank of Feeb, Miss	3,105.00
Dec. 9, 1909, note of Bank of Red Bay	1,500.00
Dec. 9, 1909, note of J. G. Grimm	108.00
Dec. 9, 1909, note of C. B. Barnes	135.00
1909, Note of T. L. Hawkins	105.35
Dec. 22, 1909, note of 2,500 Brannon & Smith note given in substitution for following notes:	
B. F. Nichols	105.00
J. W. Nichols	482.29
William Edwards	520.00
J. M. Kidd	1,000.00
C. H. Butler	600.00
Union Produce Co.	100.00
217 D. M. Filke	100.00
Total of notes substituted	2,707.29
Dec. 28, 1909, note of E. W. & A. W. Bell	200.00
Jan. 3, 1910, note of (Bal. Red Bay Note)	2,500.00
Jan. 8, 1910, note of Mrs. R. Wood	500.00
Carl Seals	100.00
N. J. W. Peters	250.00
D. H. Cooper	110.00
Jan. 18, 1910, note of D. H. Cooper (another note)	200.00
Jan. 12, 1910, note of W. B. Brown	250.00
C. W. Wright	125.00
Howe Furniture Co.	50.00
Union Produce Co.	100.00
C. W. Ebersole	500.00

Jan. 31, 1910, note of W. G. Quinn	400.00
Feb. 3, 1910, note of E. N. Pinkart	500.00
Ebersole	80.00
G. Lusby	200.00
C. H. Butler	500.00
Feb. 24, 1910, Note of Floyd Dean (part payment)	1,500.00
Feb. 28, 1910, Note of (Balance of Note charged against City Bank & Trust Co.)	327.53

On February 11, 1909, we discounted for the Citizens Savings Bank a note of $28,000. The Citizens Savings Bank was taken over by the Alabama Trust & Savings Co. This was prior to Sept. 27, 1909. We had a number of other notes as collateral, upon which was received the following payments:

March 31, 1909, E. G. Cole, $2,046.67; July 4, 1909, E. G. Cole, 2,000.00; August 11, 1909, J. T. Watson 301.07; August 30, E. W. Bell, 100.00; Sept. 1, 1909, Schultz, 250.00; Sept. 16, check on Second National Bank sent us for $200 in payment of some note which I am not able to trace; Oct. 1, 1909, City Bank & Trust Co. remitted $1,000 in payment of same note; Dec. 5, 1909, from sale of 20 shares of Bank of Portland, Ala., stock, $1,500; Dec. 15, C. D. Ebersole $600.00; Dec. 23, from the sale of North Birmingham Bank stock 12,506.50; Jan. 12, 1910, C. D. Ebersole, 500.00; Jan. 17, 1910 H. B. Bannon, $1,250.00; J. D. Ricker, 75.00; Jan. 22, 1910, C. D Ebersole, $600.00; Jan. 30, 1910. E. P. Cox, 5,408.60, of which 4,946.83 was the balance of this note, and 232.00 was the interest on this note and $229.00 credited to the City Bank and Trust Co. 232.00.

On March 22, 1910, Mr. Seals, Vice President of the City Bank & Trust Company called at the Second National Bank and there
218 was a dispute as to the liability of the Alabama Trust & Savings Company on certain stock notes. We came to a compromise by which we made an allowance against these notes of $50,000 and released to them all the collateral which we held, with the exception of enough to protect the balance of the obligation somewhere around $16,000. We held enough collateral to protect us on that $16,000. Nothing was realized by us upon the collateral retained by us after March 22, 1910.

On May 1, 1909, there appears a credit of $10,455.33 upon the note of $14,200 of the Alabama Trust & Savings Co. That was paid by Gus T. Brannon giving his note for $15,000, of which $10,455.33 was applied against the Interstate Securities Company's note and the balance took up Gus T. Brannon's $15,000 note.

Brannon's note for $15,000 was never paid.

We never applied any proceeds from any collateral received from the Alabama Trust & Savings Co. upon an individual note, but whenever we collected any collateral which we received from banks, we applied it on their obligations.

Defendant offers letter signed "Ben T. Head, Vice President" dated October 1, 1909, which reads as follows:

(Letter-head of City Bank & Trust Company.)

"G. W. Williams, Cashier, Cincinnati, O.:

We enclose resolution adopted by Board of Directors of the Alabama Trust & Savings Co. on the 27th day of September, 1909, authorizing the transfer of the entire assets of said Bank to the City Bank & Trust Co. Please send to the said City Bank & Trust Company, a detailed list of all notes and such other collateral that you hold belonging to the said Alabama Trust & Savings Co.

(Signed) BEN T. HEAD,
Vice Pres't."

The resolution referred to reads as follows:

September 27, 1909.

"At a meeting of the Directors of the Alabama Trust & Savings Company held this day the proposition of the City Bank & Trust Company to merge the two banks by the liquidation of the Alabama Trust (a copy) herewith attached of their proposition was accepted, and we hereby transfer entire assets of this Bank to the City Bank & Trust Company, as a protection for the assumption of the depositors and liabilities.

ALABAMA TRUST & SAVINGS CO.,
ECTOR H. SMITH,
Vice President & Director.
219 TOM STOBERT,
Cashier & Director.
J. E. SHELBY, *Director.*"

Witness says that he followed the instructions of that letter and everything became the City Bank & Trust Co. The indebtedness was looked upon as the indebtedness of the City Bank & Trust Company. To the best of my knowledge, the Second National Bank never received any notice of any objection from any stockholder or creditor of the Alabama Trust & Savings Co. to the transfer referred to in the letter.

Defendant offered the following letters, towit:

(Letterhead of) City Bank & Trust Co.

"BIRMINGHAM, ALA., July 12-09.

Mr. G. W. Williams, Cashier, Cincinnati, Ohio.

DEAR SIR: I wrote you today that Mr. Smith of the Alabama Bank & Trust Co., would not agree for an examination of his bank, and without one sees what they are getting we don't want to buy or trade. As far as we are concerned, we will decline to consider a consolidation. If they desire it we might be willing to undertake to liquidate their bank provided after an examination we think their assets were sufficient to pay their liabilities.

I am writing this for your information and feel that it is my duty to do so.

(Signed) BEN T. HEAD, *Pres't.*"

To the letter of July 12th was pinned a yellow sheet, offered by defendant in evidence, which reads as follows:

Mr. Ector H. Smith, Vice-President, Alabama Bank & Trust Co., City.

DEAR SIR: I would suggest that you have Mr. Porter to go over the notes register with you, and ascertain the amounts of the notes, and you to explain the same to him, and he to examine your bank and then come and examine this bank, and then after his report to get together, but I would suggest that he make an examination right away, today.

Yours very truly,"

——— ———.

Letter of July 12-09.

Mr. G. W. Williams, Cashier, Cincinnati, Ohio.

DEAR SIR: A few days ago Messrs. Brannon & Smith, of the Alabama Bank & Trust Co., have been after us to consolidate the two banks together.

220 By verbal agreement with Mr. Smith, Mr. Porter was to examine the banks, and if the conditions were satisfactory to justify us we would consider the consolidation, but this morning it seems that they have a promise from you of some money which to ease them up and carry on their business, and they will not agree for an examination. I am writing this so that you will understand the exact conditions as they exist. If you desire under the condition to furnish any more money to those people you can do so, but I would advise an investigation of the affairs before doing so. This letter is written in strict confidence which I trust you will keep.

Yours very truly,

(Signed) BEN T. HEAD,
President.

We will not consider consolidation without we can have a thorough examination.

Also letter:

"BIRMINGHAM, ALA., Sept. 11-09.

Mr. G. W. Williams, Cashier, Second National Bank, Cincinnati, Ohio.

DEAR MR. WILLIAMS: In regard to our conversation over the telephone yesterday, asking you to confirm statement given to us by Mr. E. H. Smith, all the notes and bills made held as collateral of the Alabama Trust & Savings Co.

I called up Mr. Smith, and requested him to instruct you to give us the information desired. After talking with Mr. Smith he told me he had a letter from you giving an itemized statement of the collateral held by your Bank, this is what our Directors wanted to know before they agreed to take over and liquidate their Bank. We have called our meeting for Monday morning at ten o'clock in regular session to approve of the plans as outlined by us in taking over the Bank.

I will advise you Monday morning regarding taking over the Alabama Trust & Savings Co.

Yours very truly,

(Signed) BEN T. HEAD,
President."

"BIRMINGHAM, ALA., Sept. 13th, 1909.

Mr. G. W. Williams, Cashier, Cincinnati, Ohio:

We have just adjourned meeting with the Directors of the Alabama Trust & Savings Company, after two days negotiation
221 all details have been agreed upon and it is agreed to take their Bank over tomorrow night Sept. 14th to liquidate.

(Signed) BEN T. HEAD,
President."

"BIRMINGHAM, ALA., Sept. 16th, 1909.

Mr. Geo. W. Williams, Cashier, Second National Bank.

DEAR SIR: Your favor of the 14th to hand, also the 15th, and beg to advise that the combination is working along smoothly, but I think surely, and it will be a matter of a few days when it will be consummated.

Yours very truly,

(Signed) ECTOR H. SMITH,
Vice-President."

"BIRMINGHAM, ALA., Sept. 16-09.

"Mr. G. W. Williams, Cashier, Cincinnati, Ohio.

DEAR SIR: When I wrote you last week that we would meet that evening we expected to take over the Alabama Trust & Savings Co. business.

Both Boards of Directors met and I understood they agreed to accept our proposition which was this: We were to liquidate the Bank, assume the deposits and also their liabilities such as rediscounts & etc.

Mr. Smith assured me that everything was satisfactory and we would take over their business that afternoon. Mr. Worthington was to go do[illegible] and check over their business and also to check up their books, bu[illegible] Mr. E. R. Stewart who is one of the Mr. Smith's directors became dissatisfied with the trade and has been holding the deal up.

I have just returned from having a conference with Mr. Smith and told him we wanted to know for certain tomorrow whether they were

going to carry out their agreement or not. He informed me he received a long letter from you asking how everything was getting along towards consummating the deal.

I have put forth every effort I could to close the matters up and Mr. Smith assures me he thinks he can arrange to get Mr. Stewart to agree with the rest of the Directors for us to take over their Bank. I will wire you immediately when they sign all necessary papers.

I am sorry we have been unable to close up before this as I assured you we would close up all matters last week.

Yours very truly,

BEN T. HEAD,
President."

222 "BIRMINGHAM, ALA., Sept. 27th, 1909

"Mr. G. W. Williams, Cashier, Cincinnati, Ohio.

DEAR SIR: We today took over the Alabama Trust & Savings Co.'s business and elected Mr. Worthington President, myself and E. H. Smith Vice-Presidents. Mr. Worthington will on tomorrow write you full particulars and send you statement of the business.

Yours very truly,

BEN T. HEAD,
Vice-Pres't.

"BIRMINGHAM, ALA., December 29th, '08.

"Mr. G. W. Williams, Cashier, Second Nat'l B'k, Cincinnati, Ohio.

DEAR SIR: We are enclosing herewith checks and drafts to you for credit amounting to $100,000.00. Upon receipt of this letter please wire the Bank that they have credit for the same so that in case the Bank examiner questions whether we have the money, we will have your telegram showing that we have the money there to our credit.

We have the stock all subscribed for but as we wanted to get ready and open for business on January 2nd, we could not do so by waiting until we could notify them to send in the checks.

We will send remittances to take up the stock from time to time as we get the checks from the respective stockholders.

Please wire us upon receipt of this letter and greatly oblige,

Yours truly,

(Signed) BEN T. HEAD,
President City Bank and Trust Company.

Defendant offered in evidence statement from City Bank & Trust Company dated May 29, '09. Said statement shows:

Loans and discounts	96,061.34	
Bonds and stocks	45,740.00	
Furniture and Fixtures	9,395.76	
Expense	8,770.54	
Exchange	11,709.00	
Cash in Bank and other Banks	53,445.15	213,529.88

Liabilities.

Capital stock		100,000.	
	Earnings	1,316.49	
223	Bills Payable	12,386.65	
	Savings Deposits	3,972.86	
Individual Deposits		58,801.38	
Certificates of Deposit		17,000.00	
Bank Deposits		19,892.54	
Certified checks		159.96	213,529.88

Defendant offers letters as follows:

"BIRMINGHAM, ALA., Dec. 31, 1909.

Mr. G. W. Williams, Cashier, Second National Bank, Cincinnati, Ohio.

MY DEAR SIR: This is to acknowledge receipt of your letter of the 29th inst., advising us that you have credited the $12,506.50 being the proceeds of the sale of the North Birmingham stock on the note of the Interstate Securities Co.

In reply beg to advise that we will have to ask that you credit the note of the Ala. Trust & Savings Co., dated July 12th, 1909 for $28,000.00 or the note of the Citizens Saving Bank for like amount, dated Feb. 1st, 1909, with the proceeds of this stock. The note of the Interstate Securities Co. being a personal obligation of the stockholders of the Ala. Trust & Savings Co., we ask that you make the proper credit and advise us accordingly. The stockholders of the Ala. Trust & Savings Co. have advised us if any of the assets of said Bank should be applied upon the personal obligations of some of the stockholders they will bring immediate action upon us through the courts.

Thanking you for your prompt attention to this matter, I beg to remain,

Yours very truly,

(Signed) E. C. DUNN,
Cashier."

Defendant offers letter of October 7, 1910 notifying Second National Bank of Cincinnati that the Guarantee Bank & Trust Company had been placed in the hands of a receiver. (Signed) E. D. Smith, Receiver.

Witness Gutting, having his attention called to the General Ledger and Statement Book of the Alabama Trust & Savings Company as of September 27, 1909, says that this statement appears to show what Mr. Abbott called a trading loss of $74,480.11, but he fails to include $25,519.89 in their loans and discounts which "I would also classify as a trading loss."

According to this statement the loans and discounts of the
224 Alabama Trust & Savings Co. amounted to $268,778.95, and as shown by the City Bank & Trust Company, the amount turned over was $243,259.06, showing a difference of 25,519.89.

Cross-examination:

"Q. You say that according to the books of these banks. You have not these books before you at this time?

"A. No. I went down there and made my records from these books.

"Q. Whether those books were correctly kept or not you don't know that?

"A. There might have been some slight errors in them, but they could not have been of any material consequence."

I never had anything to do with either one of these banks and all the knowledge I have is from the correspondence.

"Q. So when you appear to talk about it in your testimony as if you had been on the job and taken a hand in it yourself you don't mean to make any such impression?

"A. No, nothing at all, except what I got from the correspondence."

There is nothing on the books of the Second National Bank showing the amount of collateral received from the Alabama Trust & Savings Company. We collected the collateral as fast as we could and applied it on the notes. We have collected the entire amount which was applied on the note of $28,000.

The Alabama Trust & Savings Co. did not turn over any of the collateral which was held by the Second National Bank, because we would not let them. We held the collateral.

The Second National Bank keeps a register in which there is kept a record of notes, which show discounts, and has always kept complete records. I will look for the record ledger showing loan of $100,000.00 to Ben T. Head about October 1, 1908, but I think I have looked without success.

I will bring record ledger showing the notes of Stobert, W. K. and Ector H. Smith, Lewis, Brannon, and Interstate Securities Company. And I will bring the minutes of the Bank having any recitals relating to these notes. And I will bring any book we have showing the money paid out on the $100,000 note after the loan to Ben T. Head.

All of the payments that I have testified to this morning came from collateral which we held as collateral to the different notes.

225 The City Bank & Trust Company first started business with the Second National Bank on December 31, 1908, and the loan for $75,400 upon the note signed by R. C. Head, Agent, Ben T. Head and J. S. Head, Jr., was made on December 31, 1908. The loan was gradually paid down to $15,000 by collateral and the City Bank & Trust Company endorsed the note, and therefore they were liable on it. I have a record of the payments which we received and also a record that there were 745 shares of the City Bank & Trust Company stock as collateral.

After the City Bank took over the assets and liabilities of the Alabama Trust & Savings Company, the collateral got mixed and we could no more tell whether it was City Bank & Trust Co. or the Alabama Company from our books. And when Mr. Webb came up and gave his note for $50,000 we returned him all collateral we had except a certain amount to protect us on the City Bank & Trust Company notes, that is still unpaid.

We turned over to Mr. Seals a lot of collateral we had received from the Alabama Trust & Savings Co. and released them on $50,000 of their obligations. I imagine we turned over twice $50,000 on collateral. The balance of the collateral which we retained, we tried to collect some of it, and in January, 1911, we sold what we had left, realizing $6,262.10.

Cross-examination of Witness Resumed August 20, 1914:

"Q. Have you produced your record ledger and ledger sheet showing loan of $100,000 by Second National Bank to Ben T. Head?

"A. No. I was not able to find that sheet. I went all through our files. The first record I find, Alabama Trust & Savings Company of Birmingham, Brannon & Smith, 97,000 dollars."

Our records show on January 9th, 1909 we discounted for the Alabama Trust & Savings Company note of Brannon and Smith for 97,000 dollars.

"Q. In what form did you have that 97,000 dollars?

"A. They had evidently given that note, put it up for some note that was previously in the bank, because there was no cash paid out to anybody.

"Q. Read the beginning with the number what the page shows?

"A. Number 8073. Date, January 9, 1909. Brannon and Smith 97,000 dollars. Collateral 970 shares Alabama Trust & Savings Company."

On January 18, 1909 there was a payment of 9,700 dollars
226 and 97 shares of the stock released. On January 20th, 1909 the balance, 87,300 was taken up by the following notes: Gus T. Brannon, 15,000, Tom Stobert, 10,000, W. K. Smith, 10,000, Interstate Securities Company, 25,000, Gus T. Brannon, 7,300, J. R. Lewis, 5,000 and Ector Smith, 15,000. These notes were endorsed by the Alabama Trust and Savings Company and carried collateral.

These individual notes were later on taken up by notes of the Alabama Trust & Savings Company endorsed by these individuals. On June 4, 1909, the following notes were given: Alabama Trust & Savings Company, endorsed by W. R. Smith for $10,000, another endorsed by Inter-State Security Company for $14,200, another endorsed by J. R. Lewis for 5,000, another endorsed by Ector H. Smith for 15,000, one endorsed by Tom Stobert for 10,000, Gus T. Brannon 15,000, Enos R. Stewart 15,000.

I went through the minutes of the Second National Bank from June 1, 1908, to the middle of 1910 and can not find any reference to any Birmingham loans of any kind.

"Q. I want to know how much of the Second National Bank claim was owing from the Alabama Trust & Savings Bank, March 22nd, 1910?

"A. There was due from the Alabama Trust 66,544.67."

And that included all of the notes of the individuals I have named.

Redirect examination:

At the end of each month we sent to every correspondent on our books an account current showing in detail all transactions between

the Bank and the party to whom it was sent. With this account current we sent a reply slip requesting report within ten days, and stating: "If not advised to the contrary within one month we shall understand you to acknowledge this statement to be correct." We sent such sheets to the Alabama Trust & Savings Company every month.

The amount of discounts of the Alabama Trust & Savings Company as of September 29, 1909, of $238,778.95, included the collateral which we held.

Defendant offers in evidence Petition in the Superior Court of Cincinnati, case No. 54936, Edward D. Smith, Receiver of Guarantee Bank & Trust Company v. The Second National Bank, filed December 28, 1910;

Also Transcript of the Docket and Journal Entries;

Also Affidavit of Charles H. Abbott in the same case;

Also Entry of December 29, 1910;

227 Also Entry of February 8, 1912;

Also Petition in Error No. 5283, Circuit Court of Hamilton County, Edward B. Smith, Receiver, Plaintiff in Error, vs. Second National Bank, Defendant in Error.

Also Entry of February 8, 1912; of which papers in said case, below and above, the material portions read as follows:

"Petition.

Edward D. Smith says that by an order of the Chancery Court of Jefferson County in the State of Alabama, made on October 5, 1910, in a case therein pending wherein Alex M. Garber, as Attorney-General of the State of Alabama, was plaintiff and Guarantee Bank & Trust Company, hereinafter called Guarantee Bank, was defendant, said court having jurisdiction in the premises, he was appointed receiver of the said Guarantee Bank, and that he did on said day qualify and become said receiver. He says that said Guarantee Bank, at the time he was appointed its receiver as aforesaid, was a corporation incorporated and organized under the laws of the State of Alabama authorized to do and was doing at said time a general banking business, and that its place of business at said time was in the City of Birmingham at the County of Jefferson in said state; that by his said appointment as said receiver he has become invested with title to all the property and assets of and choses in action belonging or due to said bank or to which it was entitled, and that by virtue of his said appointment as said receiver and of orders duly made by said court in said cause it has become and is his right and duty to take possession of all the foregoing property, wherever the same may be located or be due, and to protect generally the assets and property of said Guarantee Bank, and that it is his right and duty, by virtue of his said appointment as said receiver and by virtue of orders of court made in said cause, to collect all the assets of said Guarantee Bank and to discharge its liabilities as far as the assets thereof will go, and to prosecute all actions and suits necessary to accomplish the aforesaid purpose or any of them, or for the adjustment of accounts between said Guarantee Bank and any of its predecessor banks hereinafter mentioned and third persons that may be in dispute.

Plaintiff says that the Alabama Trust & Savings Company hereinafter called the Alabama Trust was a corporation incorporated and organized under the laws of the State of Alabama authorized to do a general banking business, and was doing such business in said Birmingham prior and up to September 27, 1909; that on said
228 last named date another corporation, to-wit, the City Bank & Trust Company, hereafter called the City Bank, incorporated and organized under the laws of said State authorized to do a general banking business and doing such business at said Birmingham, purchased and took over, by contract, all the assets of said Alabama Trust, and assumed all its liabilities; that on the — day of May, 1910, the name of said City Bank & Trust Company was changed to that of Guarantee Bank & Trust Company, being the same bank herein designated as the Guarantee Bank and the same whereof this plaintiff was appointed receiver as aforesaid.

Plaintiff says that the said Alabama Trust, on or about October 1, 1908, had sundry dealings with the defendant in this case consisting of loans, discounts, and debit and credit accounts, involving many transactions, and that said dealings and accounts were continuous to said September 27, 1909, the date at which the City Bank became possessed of the state of said Alabama Trust and assumed its liabilities, and that said City Bank and also the said Guarantee Bank continued a similar line of dealings and of transactions with said Second National Bank.

Plaintiff says that the aforesaid dealings and transactions have resulted in disputed accounts between the said Guarantee Bank and the defendant which this plaintiff is unable to adjust with the defendant because said defendant claims the right, which right this plaintiff denies, of applying credits of said Alabama Trust of said City Bank and of said Guarantee Bank, due them or some of them from defendant to the payment of debts due or claimed to be due defendant from certain individuals, said claim of right of app-opriation being based on alleged guaranty by said banks of payment of said individual debts, which credits so appropriated by said bank under said claim amount, as plaintiff is informed and believes, to over $37,700.00. This plaintiff says that he has had an examination of said dealings and transactions made by a public accountant, and plaintiff states, upon information and belief, that on a proper statement of account and proper settlement thereof the defendant would be indebted to him as said receiver in an amount exceeding said sum last named with interest at the rate of six per cent per annum.

Plaintiff further says that in the course of said dealings there came into the possession of the defendant, as this plaintiff is informed and believes, certain choses in action and other securities which the defendant claims were pledged to it as collateral for certain loans forming part of said dealings aforesaid, which choses in action and collaterals are as follows:

229 One note of Queenstown Hotel & Improvement Company for $1,100.00 dated August 15, 1910.

One note of Queenstown Manufacturing Company for $5,000.00 dated May 27, 1910.

One note dated March 16, 1910, of Queenstown Manufacturing Company for $2,500.00.

One note dated March 16, 1910, of Queenstown Manufacturing Company for $2,500.00.

One note of Queenstown Manufacturing Co. for $5,000.00 dated Apr. 16, 1910.

One note of Queenstown Manufacturing Company for $5,000.00 dated Apr. 16, 1910.

One note of M. R. McNeil for $1,000.00 dated March 7, 1910.

One note of M. R. McNeil for $3,300.00 dated July 20, 1910.

One note of T. H. Friel for $600.00 dated August 22, 1910.

One note of Hinds Peevey for $2,000.00 dated September 9, 1910.

One note of W. T. Herron for $2,700.00 dated October 27, 1909.

400 shares of the capital stock of Co-operative Agency Company of Rome, Georgia.

250 shares of the capital stock of the Western and Atlantic Fire Insurance Company of Nashville, Tennessee.

77 shares of the capital stock of the Bank of Pratt City.

Plaintiff further states that the said defendant also claims to hold as pledge for indebtedness forming part of the dealings hereinbefore mentioned, 671 shares of the capital stock of said Alabama Trust.

Plaintiff says that such of said collateral as consists of notes are notes on individuals or of corporations doing a private business, and are transferable and negotiable only by endorsement and delivery and are all past due, and that the parties liable on said notes are entirely unknown in the City of Cincinnati. And plaintiff says that the capital stock forming part of said collateral is the stock of corporations incorporated under and doing business in Georgia, Tennessee and Alabama, respectively, and the business done by said corporations is local in said States, and that said corporation and the said stock of the same are entirely unknown in the City of Cincinnati, and that to sell the same in Cincinnati would result in a complete sacrifice of their values.

Plaintiff says that on December 19, 1910, the defendant did
230 serve upon him a written notice that it held as collateral to an indebtedness of the said City Bank to it the notes, stock and securities hereinbefore mentioned, and that it would on December 30, 1910, at the office of W. E. Hutton & Co., in the First National Bank Building, Cincinnati, Ohio, offer the same at public sale and would then and there sell the same, and that it would apply the proceeds of the same on an alleged indebtedness to it on the part of the said City Bank and on the part of the said Alabama Trust.

Plaintiff says that the said indebtedness on which the defendant notified plaintiff that it would apply the proceeds of sale of said collateral is part of the transactions, discounts and debit and credit accounts hereinbefore mentioned.

Plaintiff denies that upon a proper settlement of accounts there would be, for the reasons aforesaid, any indebtedness from said City Bank, or said Alabama Trust, or said Guarantee Bank or from this plaintiff due to the defendant.

Plaintiff further says that he does not know under what terms the said notes and securities were pledged to said defendant, if they were

pledged to it, and therefore can not say whether the terms of said pledge authorize the sale of said securities in Cincinnati. But plaintiff says that the defendant has no right to sell said collateral because, as plaintiff believes and avers, neither said Alabama Trust, nor said City Bank, nor the Guarantee Bank nor this plaintiff is indebted to defendant in any amount whatever, and further, that because of the nature of said collateral as aforesaid the defendant is not authorized in law to sell said collateral, and plaintiff avers that he does not know of and therefore denies that any authority to sell said notes and securities was in fact given to defendant. Plaintiff says that the sale of said collateral by defendant would work irreparable injury to him as receiver as aforesaid.

Wherefore plaintiff prays that the defendant, its officers, agents and employes, be enjoined from selling any of the notes or stock hereinbefore described, or from permitting the same to be sold on December 30, 1910, or until further order of the court in that behalf made in this case; and plaintiff further prays that there be an accounting between him and the defendant as to all matters and things hereinbefore mentioned or thereunto in any way pertaining, and as to all claims of the defendant against him or any of the banks hereinbefore mentioned, and that this court determine the state of the accounts between said parties and decree accordingly; and for all other
231 relief that the plaintiff may in equity be entitled to.

HARMON, COLSTON, GOLDSMITH & HOADLY,
Attorneys for Plaintiff."

(*Journal Entry in Same Case.*)

1910, Dec. 29.—Summons issued.
1910, Dec. 29.—Affidavit of G. W. Williams filed.
1910, Dec. 29.—Min. 833: Entry overruling motion for temporary injunction; plaintiff excepts.

And now came the plaintiff and moved the court for a temporary injunction as prayed for in the petition and said motion was argued by counsel for plaintiff and for defendant and the court being advised in the premises does find that the plaintiff has an adequate remedy at law and that the alleged threatened acts of the defendant will not work irreparable injury to the plaintiff and said motion is therefore overruled, to which plaintiff excepts."

(*Affidavit of Charles H. Abbott in said Case.*)

Charles H. Abbott, being first duly sworn, says that he is a public accountant doing business in Birmingham, Alabama; that he was employed by Edward D. Smith, Receiver of the Guarantee Bank & Trust Company, to examine the books of the several banks mentioned in the petition in this case; that he found a statement made to the Alabama Trust & Savings Company by the Second National Bank among the papers of the said The Alabama Trust & Savings Company, a correct copy of which statement is hereto attached

marked Exhibit "A", and that said statement showed that on June 11, 1909, the Second National Bank charged to said the Alabama Trust & Savings Company $17,200.00 as being credited on note of G. T. Brannon as to $10,000 of said credit, and on note of W. K. Smith as to $7,200 of said credit.

Affiant says that the books and accounts and papers of said The Alabama Trust & Savings Company do not show that it made any notes, bills payable or other evidence of indebtedness on which the name of either G. T. Brannon or W. K. Smith appeared, and that so far as the books and accounts and papers of the Alabama Trust & Savings Company are concerned or show, the said Second National Bank had no authority whatever to charge said sums of $10,000 and $7,200 against the Alabama Trust & Savings Company, and that said two sums, as far as the books, papers and accounts of the Alabama Trust & Savings Company are concerned, are still due to it.

232 Affiant says that if the notes on which said two sums of $10,000 and $7,200 respectively are credited, and which said Bank in its said account described as being notes of G. T. Brannon and W. K. Smith, are notes on which the name of the Alabama Trust & Savings Company appears, that such notes do not appear in the bills payable accounts kept by the Alabama Trust & Savings Company; and affiant states on belief that if there are any such notes, they are not valid obligations of said The Alabama Trust & Savings Company, and that said The Second National Bank still owes the amount of $17,200.00 to the Guarantee Bank & Trust Company, or its Receiver.

Affiant further says that during the months of June, July, August and September, 1909, The Second National Bank received from The City Bank & Trust Company of Birmingham, Alabama, of certain promissory notes of third persons in varying amounts, with directions to collect the same and apply said collections to the indebtedness of the City Bank & Trust Company. That the said, The Second National Bank did collect from these sources during said time about $13,500.00 and wrongfully credited said amount to an indebtedness due said Second National Bank from R. C. Head, Agent, B. T. Head and J. S. Head, Jr.

Affiant further says that the said The Second National Bank in addition to the above, applied moneys due from it to the City Bank & Trust Company and said The Alabama Trust & Savings Company, to the extent of $7,000.00, to payment of interest accrued on notes of certain individuals, for which neither the City Bank & Trust Company nor The Alabama Trust & Savings Company was liable.

Affiant says that these sums of $17,200.00 and $13,500.00 and $7,000.00 if properly credited would leave the Second National Bank indebted to the plaintiff herein in the sum of about thirteen thousand dollars ($13,000.00).

Further affiant sayeth not.

(Signed) CHAS. H. ABBOTT."

Sworn to the 28th day of December, 1910.

Alabama Trust & Sav., Birmingham, Ala., In Account with Second National Bank, Cin.

Dr.

June 1. Ex.	.....		.60
2. "	.....	.30	
10031	.....	5,000	
R.	.....	6	
			5,006.30
3. 10032	.....		5,000.00
4. Tel. Galbreath to Head	.....	.....	.....
10033	.....	1,000	
Loans	.....	84,200	
Ex.	.....	.70	
"	.....	.30	
			85,204.75
7. "	.....	.....	.60
8. R.	.....	.....	3.40
11. Cr. on Note G. T. Brannon	.....	10,000.00	
Cr. on Note W. K. Smith	.....	7,200.00	
			17,200.00
12. Tel Mr. Galbreath	.....		12.50
14. R.	.....		15.00
15. Tel. Brown to 22	.....		.68
R.	.....		4.63
Balance	.....		73.47
			112,521.93

Cr.

June 1. Bal	.....		15,894.00
1. L.	.....	174.40	
		453.83	
			628.23
2. "	.....	.....	166.90
3. "	.....	175.14	
Coll.	.....	5,000	
		5,000	
			10,175.14
5. C. L.	.....	84,200	
L.	.....	972	
"	.....	413.94	
			85,405.94
		170.72	
		71.18	
			241.40
30. Int.	.....		10.32
Balance	.....	.....	.....
			112,521.93

SECOND NATIONAL BANK OF CINCINNATI, OHIO.

235 (*Entry of December 29, 1910, in Above Case.*)

And now came the plaintiff and moved the Court for a temporary injunction as prayed for in the petition and said motion was argued by counsel for plaintiff and for defendant, and the court being advised in the premises does find that the plaintiff has an adequate remedy at law and that the alleged threatened acts of the defendant will not work irreparable injury to the plaintiff and said motion is therefore overruled, to which plaintiff excepts.

(*Entry of February 8, 1912, in Same Case.*)

Upon motion of the plaintiff this case is hereby dismissed without record and without prejudice at the costs of the plaintiff.

(Petition in Error, Circuit Court of Hamilton County, Smith, Receiver, etc., Plaintiff in Error, v. The Second National Bank, Defendant in Error.)

The plaintiff in error says that in an action brought by him against the defendant in error in the Superior Court of Cincinnati, on the 27th day of December, A. D. 1910, wherein he prayed for an injunction to restrain the defendant in error from selling certain choses in action belonging to the plaintiff in error, which the said defendant in error claimed to hold as pledges.

Plaintiff in error says, that in said cause in said Superior Court, he moved the court for a temporary restraining order, and that the same was argued by counsel for the plaintiff and the defendant, and upon consideration the Court overruled said motion for a temporary injunction or restraining order, and refused to grant this plaintiff in error any preventative relief to stay the sale of said collateral; and the plaintiff in error now files in this court the original papers in said cause, and a transcript of the docket and journal entries therein.

Plaintiff in error says that there is error in the judgment of said the Superior Court of Cincinnati, in this to-wit:

Said Court erred in refusing to grant a restraining order as prayed for.

The Court erred in not allowing plaintiff in error a temporary restraining order.

Wherefore plaintiff in error prays that said order of the Superior Court of Cincinnati be reversed and held for naught, and that this court make such order as the said Court below should have made, and for all other relief.

HARMON, COLSTON, GOLDSMITH & HOADLY,
Att'ys for Plaintiff in Error."

This petition in error was filed Dec. 29, 1910.

236 (*Entry of February 8, 1912, in Last-named Action.*)

Upon motion of the plaintiff this cause is hereby dismissed without record and without prejudice at the costs of the plaintiff.

Defendant offered in evidence the following paper, dated Montgomery, November 22, 1909:

City Bank & Trust Company, Birmingham, Ala.

GENTLEMEN: The Assistant Bank Examiner has certified to me that he has made examination of your institution.

Please remit to me at once New York Exchange for the sum of Fifteen Dollars to defray expenses of said examination as provided under act of the legislature approved August 28, 1909.

Yours truly,

WALTER D. SEALS,
State President.

Entry Granting Petition and Allowing Appeal.

(Entered by Judge Sater September 30, 1916.)

This cause came on to be heard upon the petition of the complainant for an appeal to the Circuit Court of Appeals for the Sixth Circuit, and on consideration said petition is granted and the appeal allowed upon giving bond conditioned as required by law in the sum of Five Hundred Dollars ($500.00).

237 *Bond on Appeal.*

(Filed September 30, 1916.)

Know all Men by these Presents, That we, W. C. Sterrett, as Receiver of Alabama Trust & Savings Company, as principal, and Fidelity & Deposit Company of Maryland, a corporation under the laws of Maryland, as sureties, are held and firmly bound unto The Second National Bank of Cincinnati, Ohio, in the full and just sum of Five Hundred ($500.00) Dollars, to be paid to the said The Second National Bank of Cincinnati, Ohio, certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this nineteenth day of September, in the year of our Lord one thousand nine hundred and sixteen.

Whereas, lately at a session of the District Court of the United States for the Southern District of Ohio, Western Division, in a suit depending in said Court, between the said W. C. Sterrett, as Receiver of Alabama Trust & Savings Company, and the said The Second National Bank of Cincinnati, Ohio, numbered on the equity docket

at 2126, a decree was rendered against the said The Second National Bank of Cincinnati, from which decree the said W. C. Sterrett, Receiver of the Alabama Trust & Savings Company desires to take an appeal, and the said W. C. Sterrett as Receiver, having obtained an appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said The Second National Bank of Cincinnati, Ohio, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said circuit, on the 30th day of October next.

Now, the condition of the above obligation is such, That if the said W. C. Sterrett, as Receiver, shall prosecute his appeal to effect, and answer all costs and cost if he fail to make said plea good, then the above obligation to be void; else to remain in full force and virtue.

W. C. STERRETT,
Receiver of Alabama Trust & Savings Company,
By PHILIP & S. C. ROETTINGER,
Attorneys.

[SEAL.] FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,
JOHN DOYLE,
Attorney-in-Fact.

238 Sealed and delivered in presence of—
HARRY F. RABE.

Approved by:
J. E. SATER,
U. S. District Judge, S. D. O.

Citation.

(Filed October 2, 1916.)

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

To The Second National Bank of Cincinnati, Ohio, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said Circuit, within thirty days from the date hereof, pursuant to an Appeal, filed in the Clerk's Office of the District Court of the United States for the Southern District of Ohio, Western Division, wherein W. C. Sterrett, as Receiver of the Alabama Trust & Savings Company, is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said Appeal mentioned, should not be cor-

rected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this 30th day of September, in the year of our Lord one thousand nine hundred and sixteen, and of the Independence of the United States of America the one hundred and forty-first.

J. E. SATER,
Judge U. S. District Court, S. D. O.

239 Service of a copy of the above citation is acknowledged this thirtieth day of September, 1916.

CHAS. M. LESLIE,
Of Counsel for The Second National Bank, Appellee.
LANDON L. FORCHHEIMER,
Of Counsel for The Second National Bank.

Entry Extending Time for Printing of Record on Appeal.

(Entered by Judge Sater September 30, 1916.)

Upon application of complainant herein the time for printing the record on appeal is extended to the 20th day of November, 1916.

Precipe.

(Filed August 15, 1916.)

The plaintiff, W. C. Sterrett, as Receiver of the Alabama Trust & Savings Company, hereby indicates the parts of the record in this Court to be incorporated into the record on appeal to the Circuit Court of Appeals for the Sixth Circuit, to-wit:

240 Bill filed May 11, 1912;
Answer filed July 29, 1912;
Replication filed August 6, 1912;
Opinion of Judge Sater filed May 28, 1914;
Motion of defendant to dismiss bill or to reopen case with leave to amend, filed June 5, 1914;
Order of Court reopening case, and giving leave to amend, filed June 5, 1914;
Amended bill filed June 10, 1914;
Answer to same filed June 29, 1914;
Motion of plaintiff to strike out portions of answer filed June 9, 1914;
Agreement of parties filed July 31, 1914;
Opinion of Judge Sater filed November 20, 1915;
Opinion of Judge Sater filed May 1, 1916;
Final decree entered May 1, 1916;
Motion to transfer cause to law side of the Court, July 3, 1916;

Order of Judge Sater refusing transfer to law side of the Court, July 3, 1916;
Petition of defendant for leave to file amendment, filed July 3, 1916;
Assignment of errors filed July 8, 1916;
Petition for allowance of appeal filed July 8, 1916;
Statement of evidence as filed approved by Court;
Order overruling Petition for leave to file Amendment to Answer, entered Sept. 28, 1916;
Clerk's certificate;
This precipe;
All proceedings relating to appeal, security given, copy of citation and evidence of service.

PHILIP & S. C. ROETTINGER AND
E. H. DRYER,
Att'ys for Complainant Sterrett, Receiver.

The undersigned, of counsel for the defendant, acknowledges service of a copy of the above precipe this 15 day of August, 1916.
CHAS. M. LESLIE.

Copies of præcipe mailed this day to J. B. Foraker and Ferdinand Jelke, both of whom are out of the city.
PHILIP ROETTINGER,
Of Counsel.

241 *Certificate of Clerk.*

United States District Court for the Southern District of Ohio
Western Division.

I, B. E. Dilley, Clerk of the United States District Court for the Southern District of Ohio, Western Division, do hereby certify that the foregoing 240 pages contain a full, true and correct copy of the proceedings in the case of W. C. Sterrett, as Receiver of the Alabama Trust & Savings Company, against The Second National Bank of Cincinnati, Ohio, numbered 2126 on the docket of said court, as called for in the præcipe set out in full herein as the same appears in the record and files of that Court.

Witness my hand as Clerk and the seal of said Court, at Cincinnati, Ohio, this 18th day of November, in the year of our Lord one thousand nine hundred and sixteen (1916) and of the independence of the United States the one hundred and forty-first.

[SEAL.]
B. E. DILLEY,
Clerk,
By HARRY F. RABE,
Deputy.

242 United States Circuit Court of Appeals for the Sixth Circuit.

THE SECOND NATIONAL BANK OF CINCINNATI, OHIO, Appellant,

versus

W. C. STERRETT, as Receiver of The Alabama Trust & Savings Company, Appellee.

Appeal from the District Court of the United States for the Southern District of Ohio, Western Division.

Transcript of Record as Supplementary to and in Amendment of Transcript of Record in Case No. 2998, Sterrett v. Second National Bank.

FERDINAND JELKE, JR.,
LANDON L. FORCHHEIMER,
CHARLES M. LESLIE,
JOSEPH B. FORAKER,
JOSEPH SAGMEISTER,
All of Cincinnati, Ohio,
Attorneys for Appellant.

PHILIP & S. C. ROETTINGER,
Cincinnati, Ohio;

E. H. DRYER,
Birmingham, Alabama,
Attorneys for Appellee.

243 The District Court of the United States, Southern District of Ohio, Western Division.

Transcript of Record.

Agreement.

(Filed February 2, 1916.)

In the United States District Court for the Western Division of the Southern District of Ohio.

No. 2126. In Equity.

W. C. STERRETT, as Receiver of Alabama Trust & Savings Company, an Insolvent Banking Corporation, Complainant,

vs.

THE SECOND NATIONAL BANK OF CINCINNATI, a National Banking Association, Defendant.

It is agreed that, when the Union Bank & Trust Company was doing a banking business with a branch at Childersburg, Alabama,

Mrs. Kate Rowland carried a deposit-checking account with that bank, and that at the time it went into receivership there was owing to her on such account a balance of $267.99, which did not bear interest and was entitled to preference or priority of payment in said receivership of said bank, under the provisions of Section 250 of the Constitution of Alabama; and that thereafter the said Mrs. Kate Rowland filed her said claim in said proceedings which were entitled B. A. Alford and others vs. Union Bank & Trust Company and others in Equity in the Circuit Court of Jefferson County, Alabama; and that in the progress of the administration under said receivership she was paid on her said claim a first dividend of twenty-five per-cent. (25%) and a second and final dividend of nineteen per-cent (19%).

And the plaintiff objects to the facts above agreed upon, and moves to exclude the same on the following, separate grounds:

1. As to him it is immaterial.

2. As to him it is irrelevant.

3. As to him it is res inter alias actar.

4. Such facts cannot under the issues involved in this case affect the amount of his recovery.

5. This plaintiff is not shown to have been a party to the said Kate Rowland proceedings.

6. This plaintiff is not in this suit affected by the facts hereinabove stated.

244 Dated at Birmingham, Alabama, on this the 11th day of August, 1914.

PHILIP ROETTINGER,
EDMUND H. DRYER,
Attorneys for Plaintiff.
J. B. FORAKER,
F. J. JELKE, JR.,
CHAS. M. LESLIE,
Attorneys for Plaintiff.

Petition for Appeal.

(Filed September 28, 1916.)

The above named defendant, The Second National Bank of Cincinnati, Ohio, a corporation under the laws of the United States, conceiving itself aggrieved by the decree made and entered on the first day of May, 1916, in the above entitled cause, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Sixth Circuit for the reasons specified in the assignment of errors filed herewith, and prays that its appeal may be allowed upon its giving bond in the amount to be approved by the Court, and that said bond may operate to supersede the decree complained of.

The above named defendant further prays that a transcript of the record, proceedings and papers upon which said decree was made,

duly authenticated, be sent to the United States Circuit Court of Appeals for the Sixth Circuit.

FERDINAND JELKE, JR.,
LANDON L. FORCHHEIMER,
CHAS. M. LESLIE,
J. B. FORAKER,
Solicitors for the Defendant, The Second National Bank of Cincinnati, Ohio.

245 *Assignment of Errors.*

(Filed September 28, 1916.)

And now comes the above named defendant, The Second National Bank of Cincinnati, Ohio, a corporation under the laws of the United States, and says that the decree made and entered herein on the first day of May, 1916, is erroneous and unjust to the defendant for the following reasons:

I. Because the Court erred in taking jurisdiction of the cause and deciding the same in the absence of the Guarantee Bank and Trust Company or its Receiver, E. D. Smith, the purchaser of The Alabama Trust and Savings Company's assets at an allegedly fraudulent sale.

II. Because the Court erred in finding and deciding that it had jurisdiction to determine the cause when the Guarantee Bank and Trust Company, or its Receiver, E. D. Smith, the purchaser of The Alabama Trust and Savings Company's assets at an allegedly fraudulent sale, was not a party to the cause.

III. Because the Court erred in finding and deciding that the application of $17,655.33 by The Second National Bank of Cincinnati, Ohio, to the credit of notes signed by The Alabama Trust and Savings Company was unlawful.

IV. Because the Court erred in finding and deciding that the Receiver of The Alabama Trust and Savings Company had the right to recover from The Second National Bank of Cincinnati, Ohio, the money which said Second National Bank of Cincinnati had credited to the notes signed by The Alabama Trust and Savings Company.

V. Because the Court erred in finding and deciding that the complainant was not barred by the transfer of all of The Alabama Trust and Savings Company's assets, including its choses in action to The City Bank and Trust Company which said transfer the court properly held to be honest and bona fide in all respects.

VI. Because the Court erred in finding and deciding that the compromises which barred the rights of the City Bank & Trust Company, The Guarantee Bank and Trust Company and its Receiver, the owner of all of The Alabama Trust and Savings Company's assets, including choses in action, acquired by bona fide purchase, did not likewise defeat the rights of the complainant.

VII. Because it appears from the record in this cause that complainant was not entitled to the relief granted in said decree
246 and that his bill of complaint should have been dismissed.

VIII. Because the Court erred in finding and deciding that creditors whose claims had been allowed against the Receiver of The Alabama Trust and Savings Company in The Chancery Court for the Fifth District of The Northwestern Chancery Division of the State of Alabama, and whose claims had arisen after The Alabama Trust and Savings Company had ceased to do business were entitled to an accounting from the defendant.

IX. Because the Court erred in finding and decreeing that creditors and stockholders of The Alabama Trust and Savings Company whose claims had been allowed by the Chancery Court for the Fifth District of the Northwestern Chancery Division of the State of Alabama, and whose claims were represented in said proceedings in said Chancery Court by the counsel for the Receiver of The Alabama Trust and Savings Company were entitled to an accounting from the defendant.

X. Because the Court erred in finding and deciding that the complainant and all other creditors and stockholders were not barred by their laches.

XI. Because the Court erred in finding and deciding that the complainant was entitled to relief since it appears from the record and proceedings in this cause that said complainant did not come into the Court below with clean hands.

XII. Because the Court erred in finding and deciding that complainant was not barred by estoppel.

XIII. Because the Court erred in finding and deciding that those stockholders and creditors who had filed their claims against the Receiver of The Guarantee Bank and Trust Company in the Jefferson Chancery Court were entitled to an accounting from the defendant.

XIV. Because the Court erred in finding and deciding that the claim of the Tuskegee Land and Security Company allowed by the Jefferson Circuit Court of Birmingham, Alabama, was entitled to any consideration and to an accounting from the defendant.

XV. Because the Court erred in not dismissing the bill of complaint because there was no testimony to support the allegations thereof.

XVI. Because the Court erred in finding and decreeing for complainant because the testimony was at variance to the allegations of the original, and of the amended bill of complaint.

XVII. Because the Court erred in finding and decreeing
247 for complainant because the testimony showed that the complainant's cause of action, if any, was legal and not equitable, and by rendering judgment for complainant the court deprived the

defendant of the right to trial by jury guaranteed to the defendant by the 7th Amendment of the Constitution of the United States.

XVIII. Because the Court erred in overruling defendant's motion to transfer the cause to the law docket of the Court.

XIX. Because the court erred in overruling defendant's petition for leave to file an amendment to its answer to the amended bill of complaint.

XX. Because the testimony shows affirmatively that there is no equity in Complainant's case.

FERDINAND JELKE, Jr.,
LANDON L. FORCHHEIMER,
CHAS. M. LESLIE,
J. B. FORAKER,
Solicitors for the Defendant, The Second National Bank of Cincinnati, Ohio.

Order Allowing Appeal.

(Entered by Judge Sater September 28, 1916.)

This 28th day of September, 1916, came the defendant The Second National Bank of Cincinnati, Ohio, a corporation organized and existing under the National Bank Act, and presented its petition for the allowance of an appeal to the United States Circuit Court of Appeals for the Sixth Circuit, and an assignment of errors accompanying the same, and the Court being fully advised in the premises allows said defendant's petition for an appeal upon the filing of a bond in the sum of $500.00 with good and sufficient security to be approved by the Court; and the said bond when so filed and approved shall operate as a supersedeas of the decree complained of.

248 Thereupon came said defendant The Second National Bank of Cincinnati, Ohio, and tendered its bond in said amount with the Fidelity and Deposit Company as surety, and the Court approves said bond and orders that it operate as a supersedeas.

Bond on Appeal.

(Filed September 28, 1916.)

Know all Men by these Presents, That we, The Second National Bank of Cincinnati, Ohio, as principal, and the Fidelity and Deposit Company of Maryland, as sureties, are held and firmly bound unto W. C. Sterrett as Receiver of The Alabama Trust and Savings Company in the full and just sum of Five hundred ($500.00) Dollars, to be paid to the said W. C. Sterrett, Receiver as aforesaid, his certain attorneys, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with

our seals and dated this twenty-sixth day of September, in the year of our Lord one thousand nine hundred and sixteen.

Whereas, lately at a term of Court of the United States for the Southern District of Ohio, Western Division, in a suit depending in said Court, between W. C. Sterrett, Receiver of The Alabama Trust and Savings Company vs. The Second National Bank of Cincinnati, Ohio, a judgment was rendered against the said The Second National Bank of Cincinnati, Ohio, and the said The Second National Bank of Cincinnati, Ohio, having obtained an order allowing an appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said W. C. Sterrett, Receiver as aforesaid, citing and admonishing him to be and appear at a session of the United States Circuit Court of
249 Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said circuit, within thirty (30) days from the date thereof.

Now, the condition of the above obligation is such, That if the said The Second National Bank of Cincinnati, Ohio, shall prosecute its appeal to effect, and answer all damages and cost if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE SECOND NATIONAL BANK OF CINCINNATI, O., [SEAL.]
By LANDON L. FORCHHEIMER.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND, [SEAL.]
By JOHN DOYLE,
Attorney-in-Fact.

Sealed and delivered in presence of—
E. H. MAYER.
L. C. WALBER.

Approved by—

[SEAL.]

J. E. SATER,
Dist. Judge.

Citation.

(Filed September 28, 1916.)

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

To W. C. Sterrett as Receiver of The Alabama Trust — Savings Company, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said circuit, within thirty days from the date hereof, pursuant to an appeal, filed in the clerk's

office of the District Court of the United States for the Southern District of Ohio, wherein The Second National Bank of Cin-
250 cinnati a corporation under the laws of the United States, is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this 28th day of September, in the year of our Lord one thousand nine hundred and sixteen, and of the Independence of the United States of America the one hundred and fortieth.

J. E. SATER,
Judge of the District Court of the United States for the Southern District of Ohio.

W. C. Sterrett as Receiver of The Alabama Trust and Savings Company, appellee, waives service of the within citation and enters his appearance in said United States Circuit Court of Appeals for the Sixth Circuit.

W. C. STERRETT,
As Receiver of The Alabama Trust and Savings Company,
By PHILIP AND S. C. ROETTINGER AND
E. H. DRYER,
His Attorneys.

Sundry Objections to Statement of Evidence as Prepared by Counsel for Defendant.

(Filed October 6, 1916.)

Now comes the plaintiff, appellant herein, and objects to the statement of evidence filed by plaintiff, in the following particulars and for the following reasons to-wit:

1. For the reason that the statement of record as prepared
251 by plaintiff, appellant, and lodged with the Clerk August 15th, is complete and sets forth all of the evidence that is material to the issues herein, as provided by the rules of the Court of Appeals for the Sixth Circuit and the statutes in such cases made and provided.

2. That plaintiff, appellant lodged his statement of evidence with the Clerk on August 15, 1916, and gave notice thereof to the defendant on August 16th, but that the amendment prepared by defendant was not filed within ten days, as provided by Equity Rule 75 of said Circuit Court of Appeals, and no extension of time was applied for or granted for the filing of said statement.

Plaintiff, appellant, objects to the setting out in full of Exhibit "A," as appears at pages 53 and 54 of defendant's statement, for the reason that the same is a violation of Equity Rule 75, of the Court of Appeals for the Sixth Circuit, the plaintiff, appellant, having set out

all material parts of said Exhibit, as appears at pages 53 and 54 of his statement of evidence, in the following language, to-wit:

"4. This settlement shall in no wise prejudice or affect the cause or causes of action embraced in the matters and things mentioned and referred to in the suit in equity of W. C. Sterrett as Receiver of Alabama Trust & Savings Company, Complainant, v. Second National Bank of Cincinnati, Defendant, pending in the District Court of the United States for the Southern District of Ohio, Western Division; nor the subject-matter nor the subject of that suit; nor be set up or pleaded as partial "or complete defense thereof; the scope of this settlement in so far as W. C. Sterrett as Receiver of Alabama Trust & Savings Company and its estate is concerned being only that, for the said consideration passing to him, he will not further pursue said lands and property transferred as herein provided to Tuskegee Land and Security Company, or in any manner the Receiver of Guarantee Bank & Trust Company; but shall not in any other manner whatsoever be affected. But this agreement shall be in bar of the right of said Sterrett, Receiver, or his successor in office, to have any accounting of said Second National Bank of Cincinnati on account of its claim originally acquired to the mortgage under the foreclosure of which it acquired its claim to said land."

Plaintiff, appellant, objects to the setting out in full of Exhibit "J", as appears at page 95 of defendant's statement of evidence, because the same is in violation of Equity Rule 75, plaintiff having set out the material part of said Exhibit in his statement of evidence at page 100, in the following language, to-wit:

252 "Counsel for Defendant offers in evidence the petition of W. C. Sterrett, Receiver, in the case of Alex M. Garber as attorney general, against the Guarantee Bank in the Chancery Court of Jefferson County, Alabama, filed June 14, 1911. The material part of said petition consists in the asking for an order that Edward D. Smith as Receiver of the Guarantee Bank show cause why he should not surrender the books of the Alabama Trust & Savings Company to him as its receiver."

Plaintiff, appellant, objects to the part of defendant's statement beginning at page 98, following the column of figures, and continuing at page 99 to "Redirect Examination," because the matter set forth upon said pages 98 and 99 is irrelevant, immaterial and incompetent.

Plaintiff, appellant, objects to the matter set out at pages 125-*a* and 125-*b*, of defendant's statement, as being immaterial, irrelevant and incompetent, the list of loans therein set out to the City Bank & Trust Company having no connection with the controversy between Sterrett, Receiver, and The Second National Bank, and being set out contrary to the rules of the Court of Appeals.

Plaintiff, appellant, objects to the letter of October 9, 1909, addressed to G. W. Williams, Cashier, appearing at page 131 of defendant's statement, and to the letter of July 24, 1909, addressed to G. W. Williams, Cashier, at page 132 of defendant's statement, as being immaterial, irrelevant and incompetent, and contrary to the rules of the Court of Appeals.

Plaintiff, appellant, objects to the testimony of witness Gutting shown at page 136 of defendant's statement, beginning with the

words, "the books of the Alabama Bank & Trust Company," for the reason as shown by the witness in his cross-examination at page 137, that the examination of the books had taken place in Birmingham, Alabama, in the absence of the plaintiff or counsel and that witness was being examined at a later period in Cincinnati, Ohio, the books not being present, and that consequently the truthfulness and correctness of witness's statement could not be tested on cross-examination.

Plaintiff, appellant, objects to the copy of an entry beginning at page 154 of defendant's statement and continuing to near the bottom of page 157, for the reason that the same is immaterial, irrelevant and incompetent, and particularly to the affidavit of E. H. Dryer beginning at *at* page 155, for the same reasons and the further fact that said Dryer was not called as a witness in the case at bar, and
253 consequently the statements contained in said affidavit could not be tested or explained on cross-examination.

Plaintiff, appellant, objects to the report of J. B. Cobb, Receiver, beginning at the bottom of page 157 of defendant's statement and continuing to the bottom of page 158, for the reason that the same is immaterial, irrelevant and incompetent; and adds the additional objection to the setting out of all of the foregoing Exhibits in full for the reason that under said Equity Rule 75 merely the substance of the same giving the material parts thereof should be set out.

Respectfully submitted,

E. H. DRYER AND
PHILLIP & S. C. ROETTINGER,
Att'ys for Plaintiff, Appellant.

Oct. 6, 1916.

Order Extending Time for Filing and Printing Record.

(Entered by Judge Sater October 23, 1916.)

Upon application of the defendant, The Second National Bank of Cincinnati, Ohio, and for good cause shown, the time for filing and printing the record in this case in the Circuit Court of Appeals is extended thirty (30) days from October 28, 1916.

J. E. SATER,
District Judge.

254 *Amended Præcipe.*

(Filed October 23, 1916.)

The Second National Bank of Cincinnati, Ohio, appellant herein, hereby indicates the parts of the record in this Court to be incorporated into the record on appeal to the Circuit Court of Appeals for the Sixth Circuit; hereby requesting the Clerk to disregard the præcipe filed, on September 28, 1916, because most of the documents therein indicated have been incorporated into the record being printed on behalf of W. C. Sterrett, as Receiver of The Alabama Trust and Savings Company:

(1) Agreement filed February 2, 1916;
(2) Entry overruling petition for leave to file amendment to answer to amended bill entered September 28, 1916;
(3) Petition for allowance of appeal filed September 28, 1916;
(4) Assignment of errors on appeal filed September 28, 1916;
(5) Order allowing appeal entered September 28, 1916;
(6) Bond on appeal filed September 28, 1916;
(7) Citation issued September 28, 1916, and waiver of service thereon;
(8) Sundry objections to statement of evidence as prepared by counsel for defendant filed October 6, 1916;
(9) Amended and Supplemental statement of evidence and order of approval of same entered October 23, 1916;
(10) Order extending time for filing and printing record entered October 23, 1916;
(11) Clerk's certificate;
(12) This præcipe.

We hereby acknowledge receipt of copy of the above præcipe.

——— ———,

——— ———,

Solicitors for Complainant.

Proof of Service.

Landon L. Forchheimer, being first duly sworn, says that on October 23, 1916, he served a copy of the above præcipe on Messrs.
255 Philip and S. C. Roettinger, Solicitors for appellee, by leaving a copy of the same at their office 815 Gwynne Building, Cincinnati, Ohio.

LANDON L. FORCHHEIMER.

Sworn to and subscribed before me this 23rd day of October, A. D. 1916.

[SEAL.] GUSTAV E. GEBHART,
Notary Public in and for Hamilton County, Ohio.

Amended and Supplemental Statement of Evidence and Order of Approval of Same.

(Filed October 23, 1916.)

Order of Approval.

This cause coming on this day to be heard upon the statement of evidence of the defendant lodged with the Clerk on September 27, 1916, and upon the objections thereto, filed October 6, 1916, and it appearing to the court that said statement of evidence so lodged is a verbatim copy of the statement of evidence heretofore lodged on behalf of W. C. Sterrett and heretofore approved, with the exception of certain amendments and additions thereto, and it appearing

further that it is unnecessary and not in accordance with the spirit of the rules of the Circuit Court of Appeals that the two appeals herein should be heard on two records, the one being a copy of the other with the exception of amendments or additions; and it appearing further that the said additions and amendments to the statement of evidence heretofore approved herein are necessary to a proper determination of the case on the appeals heretofore perfected by the parties hereto.

256 It is hereby Ordered, Adjudged and Decreed that said additions and amendments hereto attached and made a part hereof be approved as part of the record herein and that the objections filed to said statement inconsistent with this order be overruled to all of which said W. C. Sterrett by his counsel excepts; but that all objections not inconsistent herewith be and they hereby are sustained.

J. E. SATER,
District Judge.

Insert after second paragraph ending "as I have already answered" and before third paragraph beginning "Q. From the general knowledge" R. p. 134, the following:

"Q. To what extent were you, if I may use the term, acquainted with, or what knowledge had you of the collateral which was transferred to The Second National Bank of Cincinnati, Ohio, as you have already answered?

A. I only had a general knowledge as to its value; I had no specific knowledge because Mr. Brannon made most of the loans."

Insert after paragraph ending "I went over" and paragraph beginning "About a year after" R. p. 148, the following:

"Q. What provision was made for creditors of the Alabama?

A. They were to assume.

Q. The City?

A. Yes, sir.

Q. To assume everything?

A. Yes, sir; to assume liabilities of depositors and bills payable.

Q. Under the agreement they were to take all the assets of The Alabama Trust & Savings Company, were they?

A. Yes, sir.

Q. Whatever claim that The Alabama Trust & Savings Company had to this $17,000.00 deposit in The Second National Bank passed to the City Bank by that deal, did it?

A. Yes, sir; we told them they had charged it to our account, but we had not reconciled the statement.

Q. They passed to the City Bank along with other things; if there was anything it went to them?

A. Yes, sir."

257 Insert after paragraph ending "and I gave my demand note for $5,000.00 therefor." and before paragraph beginning "As for the transaction" R. p. 157, the following:

"Q. Did you give any paper obligation for it?

A. I gave one note for $5,000.00 on demand.

Q. Payable to whom?
A. Payable to The Alabama Trust & Savings Company."

Insert at close of testimony of Enos R. Stewart, R. p. 160 the following:

"Q. To whom did you make the note?
A. Which note?
Q. The $15,000.00 note.
A. To Alabama Trust & Savings Company.
Q. Signed by you?
A. Yes, sir."

The last sentence of the twelfth paragraph of Elmer E. Galbreath's testimony, R. p. 173, should read as follows:

"I do not know of any loan of $115,000.00."

Insert at close of testimony of E. E. Galbreath, R. p. 177 the following:

"Witness remembers no objection from any one to the change made in the notes as of May 10, and that no Directors' meeting was held at that time at his request."

Insert at beginning of cross-examination of witness Ben T. Head, R. p. 179, the following:

"Before I went to Birmingham I was Vice President of the Lexington Bank & Trust Company at Lexington, Kentucky. I also organized a bank at Junction City, Lexington Bank & Trust Company at Lexington, and The Citizens Bank & Trust Company at Ashland, Kentucky, all of which are still in existence and doing well."

Insert after list of certificates of deposits, R. p. 188, the following:
Defendant objected to introduction of certificates of deposit and to testimony in regard to same because same is immaterial, irrelevant and incompetent, particularly as to all dated subsequent to September 25, 1909.
Substitute instead of

"4. This settlement shall in no wise prejudice or affect the cause or causes of action embraced in the matters and things mentioned and referred to in the suit in equity of W. C. Sterrett as Receiver of Alabama Trust & Savings Company, Complainant v. Second National Bank of Cincinnati, Defendant, pending in the District Court of the United States for the Southern District of Ohio, Western Division;
nor the subject-matter nor the subject of that suit; nor be set
258 up or pleaded as partial or complete defense thereof; the scope of this settlement in so far as W. C. Sterrett as Receiver of Alabama Trust & Savings Company and its estate is concerned being only that, for the said consideration passing to him, he will not further pursue said lands and property transferred as herein provided to Tuskegee Land and Security Company, or in any manner the Receiver of Guarantee Bank & Trust Company; but shall not in any other manner whatsoever be affected. But this agreement shall be in bar of the right of said Sterrett, Receiver, or his successor in office, to

have any accounting of said Second National Bank of Cincinnati on account of its claim originally acquired to the mortgage under the foreclosure of which it acquired its claim to said land." R. p. 165.

the following:

EXHIBIT A.

No. 5866.

In Equity. In the Fifth District of the Northwestern Chancery Division of Alabama, at Birmingham.

TUSKEGEE LAND & SECURITY CO., Complainant,

v.

ALABAMA TRUST & SAVINGS CO., GUARANTEE BANK & TRUST CO., Formerly City Bank & Trust Co.; E. D. Smith as Receiver of said Guarantee Bank & Trust Co., and Second National Bank of Cincinnati, Defendants.

No. 6281.

In Equity. In the Fifth District of the Northwestern Chancery Division of Alabama, at Birmingham.

E. C. STERRETT, as Receiver of Alabama Trust & Savings Co., Complainant,

v.

SECOND NATIONAL BANK OF CINCINNATI, GUARANTEE BANK & Trust Co., Formerly City Bank & Trust Co., and E. D. Smith, as Receiver of said Guarantee Bank & Trust Co., Defendants.

It is agreed by the parties in said causes that they are settled and disposed of upon the following terms:

1. With the approval of the court in the cases of Mrs. Kate Rowland, et als. v. said Alabama Trust & Savings Company, and of
259 Alexander M. Garber as Attorney General, etc. v. said Guarantee Bank & Trust Company, both of which are pending in this court, said E. D. Smith as Receiver of said Guarantee Bank & Trust Company pays to said W. C. Sterrett as Receiver of Alabama Trust & Savings Company Five Hundred Dollars ($500.00), receipt of which is acknowledged, out of which said Sterrett as such Receiver pays the costs of said suit No. 6281, supra, in which he is complainant; and said Tuskegee Land & Security Company pays said Sterrett as such Receiver Five Hundred Dollars ($500.00), and the costs of said suit No. 5866, supra, in which it is Complainant.

2. Said Tuskegee Land & Security Company pays said Second National Bank of Cincinnati Nine Thousand and Five Hundred Dollars ($9,500.), receipt of which is acknowledged.

3. Said W. C. Sterrett as such Receiver, under decree of this court in said cause of Mrs. Kate Rowland et als., Complainants; said E. D. Smith as such Receiver, under decree of this court in said cause of Alexander M. Garber as Attorney General etc., Complainant; and

said Second National Bank of Cincinnati, respectively, execute deeds and transfers to said Tuskegee Land & Security Company conveying and transferring to it all their respective rights, titles, interests and estate, and all the respective rights, titles and interests of said estates of said receiverships, in and to the lands in Macon County, Alabama, known as the Olive Place, particularly described in that certain mortgage executed by the Grand United Order of Gallilean Fishermen of Alabama, which is recorded in the Probate Office of said county of Macon in Book 81, on Page 406, et seq., and without recourse, transfer all their right, title, interest and estate in and to the rents, incomes, issues and profits thereof for the year 1912, the evidences thereof and contracts therefor, the said mortgage, and such balance of the indebtedness mentioned in, and which was secured by, said mortgage and the notes therein mentioned, as remains unpaid, with all rights and remedies for the collection thereof, and said Tuskegee Land & Security Company assumes to pay the taxes upon said lands for the year 1912.

4. This settlement shall in no wise prejudice or affect the cause or causes of action embraced in the matters and things mentioned and referred to in the suit in equity of W. C. Sterrett as Receiver of Alabama Trust & Savings Company, Complainant, v. Second National Bank of Cincinnati, Defendant, pending in the District Court of the United States for the Southern District of Ohio, Western
260 Division; nor the subject-matter nor the object of that suit; nor to be set up or pleaded as partial or complete defense thereto; the scope of this settlement in so far as W. C. Sterrett as Receiver of Alabama Trust & Savings Company and its estate is concerned being only that, for the said consideration passing to him, he will not farther pursue said lands and property transferred as herein provided to Tuskegee Land & Security Company, or the Receiver of Guarantee Bank & Trust Company, but shall not in any other manner whatsoever be affected. But this agreement shall be in bar of the right of said Sterrett, Receiver, or his successor in office, to have any accounting of said Second National Bank of Cincinnati on account of its claim originally acquired to the mortgage under the foreclosure of which it acquired its claim to said land.

5. That the court render final decrees dismissing said suits No. 5866 (in which said Tuskegee Land & Security Company is Complainant) and No. 6281 (in which said W. C. Sterrett as Receiver is Complainant) in accordance with, and without prejudice to, the terms of this agreement.

Dated this the — day of June, 1912.

——— ———,
——— ———,
Attorneys for said Complainants.
——— ———,
——— ———,
Attorneys for said Second National Bank of Cincinnati, Defendant.
——— ———,
——— ———,
Attorneys — All Other Defendants in said Causes No. 5866 and 6281.

Insert instead of "The first I heard of the Alabama Trust and Savings Company being broke was along in January or February, 1910" R. p. 188, the exact testimony as follows:

"Q. Mr. Elliott when was the first time you ever heard that the Alabama Trust and Savings Company was out of business?

A. When was it I heard about it?

Q. Yes, when was the first time you ever heard that?

A. They said they were broke, was the first time I knew anything about it and that was along in January, I suppose.

Q. Wasn't it on or about February 24, 1910?

A. Yes, sir, I expect it was. Did I say January?

261 Insert between paragraph ending "and D. L. Baker" and paragraph beginning "Each paid", R. p. 189, the following:

No representations were made as to the value of the stock.

Insert at close of testimony of witness W. E. Quinn, R. p. 191, the following:

I represented the stockholders at Ft. Payne. I cannot recollect just how we were notified. There had been a re-organization of the bank, I believe it was called the City Bank and Trust Company, and Ben T. Head was running it—that bank had taken up this bank. I came down here to see about it, representing my friends here. I didn't know what the terms were only that bank had absorbed this one. I understood the day I came down here that the City Bank and Trust Company had taken it all over. I came down here once after that. The City Bank and Trust Co. had a note of mine and I was tracing that note up and I found this bank had it. It was with the Guarantee Bank and Trust Company. The City Bank did not notify me they had it, but by them taking over the proceeds I supposed they had it. I settled my note in the sum of $1,250.00 with the receiver of the Guarantee Bank for $750.00.

Substitute instead of

"Counsel for Defendant offers in evidence the petition of W. C. Sterrett, Receiver, in the case of Alex M. Garber as attorney general, against the Guarantee Bank in the Chancery Court of Jefferson County, Alabama, filed June 14, 1911. The material part of said petition consists in the asking for an order that Edward D. Smith as Receiver of the Guarantee Bank show cause why he should not surrender the books of the Alabama Trust & Savings Company to him as its receiver;" R. p. 195

the following:

EXHIBIT "J."

In the Jefferson Chancery Court.

ALEX M. GARBER, Attorney General,

vs.

GUARANTEE BANK & TRUST COMPANY.

Resp-ctfully represents W. C. Sterrett, as Receiver of Alabama Trust & Savings Co.;

(1) That Petitioner is Receiver of Alabama Trust & Savings Co., a corporation, having been thereto appointed by this Court on, to-wit, the — day of April, 1911, and duly entered upon the performance of his duties, and duly qualified as such.

262 (2) That by the order and decree of this Court so appointing Petitioner as such Receiver, he was authorized to demand and take into his possession all of the assets of said Alabama Trust & Savings Co.

(3) That a part of the assets of said Alabama Trust & Savings Co., consist in sundry books of account, kept by it while it was in business, whch show the condition of its affairs and transactions made by it, and which will greatly aid Petitioner in the performance of his duties as such Receiver.

(4) That Edward D. Smith as Receiver of said Guarantee Bank & Trust Co., has the said books of account in his possession and under his control, and has declined to surrender the same to your Petitioner unless he shall be directed by this Court to do so.

Premises, considered, Petitioner prays that the said Edward D. Smith, as said Receiver, be made a party respondent hereto, and that he be required to show cause, if any he has, why the said books of account should not be delivered to Petitioner; and Petitioner prays for all such other and further relief as he may be entitled to hereunder, and for general relief.

(Signed) GEORGE HUDDLESTON,
Solicitor for Petitioner.

NOTE.—Respondent, Edward D. Smith, as Receiver, is required to answer all the allegations of this petition, as contained in Paragraphs 1 to 4 thereof, both inclusive, but not under oath, answer under oath being waived.

(Signed) GEORGE HUDDLESTON,
Solicitor for Petitioner.

Endorsed: Alex M. Garber, etc., vs. Guarantee Bank & Trust Co. Petition of W. C. Sterrett, Receiver. Filed in Office, June 14, 1911. J. W. Altman, Register in Chancery. Service of copy of within acknowledged or notice waived. June 14, 1911. J. B. Garber for E. D. Smith, Receiver. Recorded: 6, 15, 1911.

Substitute, instead of "I did not know it at the time except as a matter of common knowledge," R. p. 195, the following:

"Q. I will ask you if you knew, in your position with the bank with which you are connected, at the time, when the Alabama Trust & Savings Co. quit doing business under that name?

A. I did, yes sir.

Q. What time was that?

A. I can not state the date, but I remember the occasion.

263 Q. About what time was that?

A. It must have been in 1910 or 1911.

Q. Refreshing your recollection was it in Sept. 1909?

A. It was about that time, but I can't give you the definite date.

Q. Who succeeded to the business of the Alabama Bank and Trust Company?

A. The City Bank and Trust Company."

It was common knowledge that the City Bank and Trust Co. had taken over the business of The Alabama Bank and Trust Company. We presented all checks and drafts drawn on The Alabama Bank & Trust Company to the City Bank and Trust Company, which honored them if the drawer had funds on deposit to pay them."

Insert after paragraph ending "business of the Alabama Trust & Savings Company" and before paragraph beginning "Mr. George Huddleston was my attorney as receiver," R. p. 195, the following:

I knew when I was appointed receiver that the City Bank and Trust Company had taken over the business of the Alabama Bank & Savings Co. I did not know whether they had taken over all the assets but I knew they had taken over some of the assets. I never heard of any of the assets going to any one else except The City Bank and Trust Co.

Insert at close of cross-examination of witness, W. C. Sterrett, R. p. 197, the following:

"I do not personally know whether any of the notes set out as collateral held by defendant in the original Bill or amended Bill were ever paid by the makers. I do not know what amount I charged in the original Bill or amended Bill that the defendant had received from the Alabama Bank & Trust Co. for which it failed to account. I have no recollection about it. I do not know that I ever brought any action to recover any assets from the Receiver of the Union Bank and Trust Company, or to set any transfer of any assets to the Union Savings Bank and Trust Company. I have had the custody of the books including the balance sheet of September 27 for two years, but have never made any attempt to ascertain the facts myself. I can not explain the meaning of the first item in the general ledger sheet of September 27 of $4,851.69 opposite the word "cash" and under the word "debit." I do not know that it means the bank had that amount of cash on that date, although I have been a bookkeeper in a bank two years and been connected with The Jefferson County Trust Co. for 14 years. The notation at the top of the general ledger

264 sheet of the Alabama Trust & Savings Co., of September 25, 1909, "As transferred to the books of the City Bank and Trust Co.", Sept. 27, 1909, "does not indicate anything to me. It does not mean anything to me. I never made any investigation as to what liabilities of the Alabama Bank and Trust Co., were paid by The City Bank and Trust Company.

I never made any investigation to ascertain how much the City Bank & Trust Co. collected from the bills receivable of the Alabama Bank and Trust Company and never made any claim against the Receiver of that bank on account of any collections made by that bank or for any other assets received by the City Bank & Trust Co. from the Alabama Bank & Trust Co. I have never made any personal investigation as to the amount realized from the assets transferred to The City Bank and Trust Co. There are no records in my possession from which can be determined whether any of the notes held as collateral by defendant were ever paid, or to whom they were paid or what the proceeds of same were. I never tried to locate any records affording any information to substantiate the allegation that defendant received other assets, to-wit; bonds, notes, claims and bills and securities receivable aggregating a value of $40,000.00 from the Alabama Bank & Trust Co. I did not see anything in the records upon which to base the allegation because I did not search for it.

I have no idea as to the amount of claims that have been presented to me as receiver of The Alabama Bank and Trust Co. I have never examined the records to ascertain.

I did not secure any information contained in the allegations in the Bill in this case and do not know anything about it."

Insert at close of paragraph ending "over to the bank to see him" and before the paragraph beginning "I have the minute book," R. p. 198, the following:

Witness testified that he was not acquainted with the signature of Thomas Boggess, Jr., and all he knew about the said letter was that he found it among the records of the Guarantee Bank & Trust Company.

Counsel for defendant objected to the introduction of said letter for the reason that same was not properly proven, as it is not shown by whom said letter is written, and has not been shown when or by whom it was received; that no knowledge had been shown on the part of either plaintiff or defendant in this case, or any of the officers of the defendant of the contents of said letter. It is a communi-
265 cation between other parties and in no way binding or controlling on this defendant, and the contents of the same are immaterial and irrelevant."

Insert between paragraph ending "an insolvency with a bank of $100,000 capitalization" and before paragraph beginning "As to the Guarantee Bank & Trust Company," R. p. 201, the following:

Irrespective of and exclusive of the liability of $84,200.00 upon the stock notes, or such portion thereof as might then have remained unpaid, The Alabama Bank & Trust Company was insolvent on September 25, 1909.

Insert at end of paragraph ending "they would have been solvent" and before paragraph beginning "The accounts of the Alabama Trust & Savings Company", R. p. 203, the following:

"Q. Mr. Abbott, I will ask you if it is not a fact that they were perfectly solvent if that note was not charged against their account?

A. If that note had not been a liability and their $100,000.00 capital had been paid in, they would have been solvent.

Q. I will ask you a third time if that note of $75,400.00 was not

charged against their account if they were not perfectly solvent, and I will ask you to answer the question "Yes" or "No."

A. I will answer it as I did the preceding question.

Q. Is that the very best answer you can give the question I ask you?

A. I think the answer is full and not evasive."

Insert after paragraph ending "to Rev. James Clarendon for $15." and before paragraph beginning "I find that on November 16" R. p. 203, the following:

The certificate of deposit of $5,000.00 to The Tuskegee Land & Securities Company was given in part payment of a note of The Gallilean Fisherman for $21,840.00, which was secured by a mortgage. The property covered by the mortgage was sold for $10,500.00, and nothing further was realized upon said note.

The two certificates of deposit for $5,000.00 each issued to Brannon & Smith by The Alabama Trust & Savings Company have never been paid, and the claim filed for payment of same was rejected."

Insert after words "as shown by this statement of September 27, 1909" R. p. 206, the following:

In addition to a trading loss of $74,844.11, as shown by the statement of The Alabama Bank & Trust Company on September 25, 1909, they were carrying a good will account of $9,000.00, an
266 item of $4,988.22, appearing to be owing from the National City Bank of Birmingham, a bank which was never in existence, and the two items aggregating $18,000.00 of worthless notes which have not been charged back. Also about $57,000.00 of the notes of the Directors and their allied interests, which have never been paid.

Insert between paragraph ending "The Second National Bank of Cincinnati" and paragraph beginning "I did not find on the books of the Alabama Trust & Savings Company", R. p. 207, the following:

I based my testimony that The Second National Bank of Cincinnati knew in detail everything about the City Bank & Trust Company upon the frequent transactions of business, such as making remittances and drawing checks. I formed my conclusion that the Second National Bank of Cincinnati participated in the organization of the City Bank & Trust Company from the minutes of the City Bank & Trust Company, and the correspondence which I have introduced in testimony.

Insert between the paragraph ending "its directors and officers" and paragraph beginning "the note of George M. Webb for $50,000.00" R. p. 208, the following:

The only credits upon the stock notes shown by the books of the Alabama Bank are $17,200.00 charged to the account of the Alabama Bank & Trust Company and $453.33 applied from proceeds of collateral.

Insert between letter from The City Bank & Trust Company to G. W. Williams, Cashier, dated September 27, 1909, and letter from Citizens Saving Bank, to G. W. Williams, Cashier, dated December 29th, '08, R. p. 222, the following:

The Second National Bank had no knowledge as to the merger of the two banks other than that contained in the letters introduced.

No officer of the Second National Bank participated in any way in the merger.

Insert between statement and letter from City Bank & Trust Company to G. W. Williams, Cashier, dated December 31, 1909, R. p. 223, the following:

The Second National Bank received this statement about two days after its date of May 29, 1909.

We did not consider the City Bank & Trust Co. insolvent prior to Sept. 27, 1909. We kept loaning them money.

We credited the checks and drafts contained in letter of Dec. 29, 1908, to the City Bank and Trust Co. and it was checked out by it.

Insert after the paragraph ending "credited to the City Bank and Trust Co., 232.00." and before paragraph beginning "On March 22, 1910" R. p. 217, the following:

267 The Second National Bank loaned to the City Bank and Trust Company on November 13, 1909, $10,000.00.

Credits from proceeds of collateral in the aggregate of $5,373.75 were applied to payment of this note and balance of $4,626.25 was paid by part of proceeds of note of Geo. M. Webb, President of the City Bank and Trust Co. for the sum of $50,000.00 which was discounted by the Second National Bank, no part of which has ever been paid. An itemized list of said credits is as follows:

1954.

"Date Payt.	Amount.	Balance.	How paid.		
Nov. 13/09.		$10,000.	Note.		
Nov. 20/09	3025.		Note Stan. Con. Co. 3025. due 9/25.		
Dec. 2	999		" R. A. Brown, Bahm. 1000 due 8/30		
Jan. 3/10	100.		" N. S. Head.		
15	600.		" Thos. Boggess, Jr.—1/3/10		
Feb. 3	550.		(" J. J. Green	250	
			(" T. H. Hopkins	100	
			(" T. N. Huley	20	
			(" E. J. Blackwood	30	400
			(" Am. Adv. Contract		
			(" Johnson H. C. Co.		50
			(" J. L. Langhorn.		25
			(" Thompson Drug Co.		25
			(" Adlerachen Co.		25
			(" L. B. Register.		25
					550
Mch. 22	99.75		Proceeds Note $100		
" 22	4,626.25		By note of Geo. Webb."		
	10,000.00				

269 The Second National Bank loaned to The City Bank and Trust Co. on December 23, 1909, $3,000.00. On March 10, 1910, we collected a note given as collateral to this note from Elwyn Ballard, the maker in the sum of $200.00. The balance of $2,800.00 was taken up by part of proceeds of Geo. M. Webb, $50,000.00 note referred to above.

On December 29th, 1909, The Second National Bank loaned to the City Bank and Trust Company $25,000.00. Proceeds from collection of collateral in the sum of $7,638.70 were credited on this note, the sum of $3,945.00 from sale of collateral, $7,496.50 was charged to profit and loss account, and the balance of $5,919.80 was taken up by part of proceeds of Geo. M. Webb, note above referred to. An itemized list of said credits is as follows:

Credits.

"Dec. 29/09 25,000. Note City Bank & Trust Co.

Jan. 8/10	155.20	Note	E. E. Forbes Piano Co.
31	800.	"	Reynolds 300. Banks 500.
Feb. 3	500	"	Ebersole,
Mch. 10	125	"	C. W. Schropshire.
" 22	5,919.80		Geo. W. Webb note.
			(Pt. Queenstn. Hotel 1500-100
June 3	600.		T. E. & J. H. Huey, 500
			" Parker & Int. 1,000.00 Note
" 8	1,058.50		" 58.50 Int.
June 29	500.		" C. D. Pantaze.
July 25	1,000.		" John Hough, 700
" 29	500.		" Pt. Chapin 500 300.
Aug. 4,	500		Pt. Chapin 200
" 12,	1,000		Spencer Bs. Col. 300.
" 26	300.		B. H. Cooper Pt. Pay't.
Sep. 29	500.		Ebersole $2,000. Pt. Pavt.
Dec. 18	100.		Queens. H. ball 400. Pd. 300 Ren. 1100
Jan. 4/11	3,945.		Cooper Bal.
	$7,496.50		M. S. Head.

Charged off." From sale of collateral.

271 On Jany. 31, 1910, The Second National Bank loaned The City Bank and Trust Company $10,000. On March 22, 1910 this note was taken up by part of the proceeds of the Geo. M. Webb note of $50,000.00 above referred to.

On Feby. 14, 1910, the Second National Bank loaned the City Bank and Trust Company $10,000.00. A credit of $249.50 from collateral note of Hines Peavy was made on March 10, 1910, and balance taken up by part of proceeds of the Geo. M. Webb $50,000.00 note.

On March 4, 1910, the Second National Bank loaned to The City Bank and Trust Co. $5,000.00. On March 22 this note was taken up by part of proceeds of the Geo. M. Webb $50,000.00 note.

On the same date, March 4, 1910, the Second National Bank discounted another note for the City Bank and Trust Company for $5,000.00 which was also taken up by the Geo. M. Webb note.

On March 22, 1910, The Second National Bank loaned The City Bank and Trust Co. $2,000.00, which was also taken up by part of proceeds of Geo. M. Webb note.

On March 14, 1910, The Second National Bank discounted the note of the City Bank and Trust Company for $5,000.00, which was taken up by part of proceeds of Geo. M. Webb $50,000.00 note.

On April 4th, 1910, The Second National Bank loaned the City Bank and Trust Co. $10,000.00 on which $2,000.00 was paid from sale of collateral and balance of $8,000.00, charged to profit & loss account.

On May 4, 1910, The Second National Bank loaned $10,000.00 to the City Bank and Trust Co. secured by collateral note of Gallilean Fishermen. On this collateral note the sum of $9,500.00 was realized and the balance of $500.00 was charged to profit and loss account.

On the date a receiver was appointed the Second National Bank held collateral received from the City Bank and Trust Co. a list of which is found in the petition in Superior Court of Cincinnati, a copy of which is set out on page — of this record. That it received from the sale of this collateral $6,262.10. That it handled the collection of this collateral for the purchaser who sustained a loss of $577.60 on same.

The Second National Bank loaned to The Guarantee Bank and Trust Company on September 23, 1910, $4,000.00. On this note sundry payments were made aggregating $1,344.48. The balance of $2,655.52 was never paid.

The only proceeds from collateral notes ever applied on any of the so called stock notes aggregating $84,500.00 was the proceeds of three notes, to wit: one of $300.00, one of $100.00 and one of $55.33.

272 I have in my testimony stated all the collateral collected by the Second National Bank and how the proceeds were applied whether said collateral was received from The Alabama Bank & Trust Company, The City Bank and Trust Company or The Guarantee Bank and Trust Company.

Insert before cross-examination of witness Gutting, R. p. 224 the following:

The books of the Alabama Bank and Trust Co., The City Bank

and Trust Co. and The Guarantee Bank and Trust Co. which I have examined show the following losses in the assets of the Alabama Bank and Trust Company.

Trading loss	$74,480.11
Difference in face value of loans & discounts as turned over to City Bank	25,519.89
Liability of National City Bank which was never in existence and which account was never paid	4,988.22
Overdrafts	1,790.77
Millport Bank Stock	2,500.00
Loss on Gallilean Fishermen Note	11,340.00
Loss on Interstate Securities Note	8,000.00
Loss on C. W. Bowles note	10,000.00
Liabilities paid not shown on statement of Alabama Bank	34,891.70
Uncollectable & worthless notes	59,935.56
Discount and interest	12,345.27
	245,822.52

Deducting the amount of actual known losses from the amount of assets turned over to the City Bank as shown by statement in ledger of date of Sept. 27, 1909, to wit: $464,077.89 the value of the remaining assets is $218,255.37.

The records of the City Bank and Trust Company shows it paid liabilities of the Alabama Bank and Trust Company as follows:

Certificate of deposit	$70,078.62
Bills payable	48,458.30
Individual deposits	47,502.95
Savings accounts	64,628.45
Other Banks	26,286.98
	$256,955.30

The City Bank and Trust Company therefore paid out in liquidating the liabilities of The Alabama Trust and Savings Com-
273 pany $38,699.93 in excess of the value of the assets it received from said Alabama Trust & Savings Co.

Insert in paragraph ending "collateral to the different notes" R. p. 225, the following:.

The sale of the stock that was attached to it.

Insert at close of cross-examination of witness Gutting, and before re-direct examination of witness Gutting, R. p. 226, the following:

"Q. Yesterday you testified you examined certain books of The Alabama Trust & Savings Co., what books did you examine?

A. Well, we examined the discount register, individual ledgers, savings account ledger. We had several of their certificate of deposit books. We had their general ledger and statement book, in fact we went through their files and got hold of all the books we could.

Q. Are you referring to the books of the City Bank & Trust Co.?

A. Both the Alabama and City and Guarantee Banks.

Insert after letter from City Bank and Trust Company, dated December 31, '09, to G. W. Williams, Cashier, R. p. 223, the following:

Jan. 4, 1910.

Mr. E. C. Dunn, Cashier, City Bank & Trust Co., Birmingham, Ala.

DEAR SIR: I have your favor of the 31st ult. requesting us to credit the proceeds of sale of the North Birmingham stock on the Alabama Trust Co. note. I beg to say we of course regard collateral held by us as general collateral to the indebtedness of all three banks. However, for your convenience, we have credited the amount on the note of the Citizens Savings Bank, as it is for a sufficient amount to take the credit.

You are mistaken in presuming that the note on which the credit was formerly made is an obligation of the Interstate Securities Co. It is a note of the Alabama Trust and Savings Bank endorsed by the Interstate Securities Co. We can therefore see no difference where the credit is made. However, for your convenience we have changed our entries as stated above.

Hoping this will find you having good success in your efforts on behalf of the City Bank, I beg to remain,

Yours very truly,

—— ——,
Cashier.

Insert between letter of September 27, '09, from City Bank and Trust Company to G. W. Williams, Cashier, and letter of De-
274 cember 29, '08, of The Citizens Savings Bank to G. W. Williams, Cashier, R. p. 222, the following:

"Oct. 9-09.

Mr. G. W. Williams, Cashier, Cincinnati, Ohio.

DEAR SIR: I have your letter of the 6th addressed to Mr. Ben T. Head, Vice President, and he had handed the same to me for reply. The situation here is this. On the 27th of Sept. we took over to liquidate the Alabama Trust & Savings Co., and I instructed Mr. Smith to notify you officially a copy of which notice I enclose herewith, and you should have received the same long ago.

With reference to the amount of $30,000.00 loan to myself, I have to say when I was in Chicago last week I sold those bonds to the American Bonding Co., the same to be taken up before our note matures. I have given them an order on you to deliver the bonds to your correspondent in Chicago, and whenever they send the order for the bonds you are instructed to deliver the same to their order, they are to pay par and accrued interest and a premium of $100.00 for the securities.

I have never been able to get at the exact facts with reference to the collateral held by your good Bank or the amount due you or the amount of balance required necessary to extend the accommodation, and I have been coming up to see you to talk the matter over for some days, but my whole time is taken up here with matters that come up

every few minutes that seem to require my personal attention. I shall endeavor to get away one day this coming week and will bring up a list of such collateral as is shown by our books held by your good Bank.

There has been some dissatisfaction between Mr. Head and Smith, and we are trying to get the tangle straightened out, and I think we have today reached what might be called a definite conclusion.

I notice your paragraph with reference to the items that you can handle and I shall give instructions at once to send you only such items as you want.

Upon examination of the City Bank & Trust Co., I found that the capital was impaired and that it was necessary to assess the capital stock 15%, I have succeeded in getting in all the money for this assessment except $650.00 which the Directors have agreed to make good. I believe now the City Bank & Trust Co. stock is worth one hundred cents on the dollar. The Alabama Trust & Savings Co., I will tell you all about when I see you.

275 Our deposits today at the close of business are $407,470.45 our demand liability is $108,716.08 and we have available cash and exchange $80,030.84 it seems to be necessary to carry an excessive amount of currency in order to do business here for the items are all collected at the bank's counter and of course takes actual cash to do business.

Further particulars I will explain when I see you next week.

Very truly yours,

JOHN WORTHINGTON."

"July 24-'09.

Mr. G. W. Williams, Cashier, Cincinnati, Ohio.

DEAR SIR: I would like to ask you to send us the Hughes Produce Co. note for collection. I have placed the Birmingham Beverage Co. note in the hands of an attorney for collection, as we did not intend to fool with those parties any longer.

We had the pleasure of having a Bank Examiner call on us today. I think he was very well pleased with the way we are running.

Yours very truly,

BEN T. HEAD,
President.

Insert the following exhibits at close of statement of evidence:

Defendant offered in evidence the order of the Court in the case of Mrs. Kate Rowland, et al., plaintiff-, vs. Alabama Trust & Savings Company, et al., defendants, No. 5583, in the Chancery Court for the Fifth District of Alabama, allowing the claims of the following creditors against The Alabama Trust & Savings Company as follows: to wit:

No.	Name of creditor.	Amount of principal.	Balance of principal.
1.	F. L. Morrell	$561.06	$190.77
2.	Gray Barger	1,481.16	503.60
3.	B. F. Day	475.00	161.50
4.	A. S. Cowan, as Trustee in bankruptcy of J. W. Powers, Bankrupt	2,346.96	797.97
5.	M. V. Phillips	100.00	34.00
6.	G. W. Holmes	30.00	10.20
18½.	J. B. Davis	133.67	44.56

276 *Non-preferred Claims.*

No.	Name of creditor.	Att'y of record.	Am't of principal.
7.	J. R. Davis, Sr.,	London & Fitts	$500.00
8.	J. C. Elliott,	" " "	1,700.00
9.	Mack Kidd,	" " "	401.75
10.	J. R. Davis, Jr.,	" " "	300.00
11.	Mrs. J. P. (or R. M.) Mackey	" " "	125.00
12.	J. H. Martin,	" " "	252.41
13.	Ed Thomas,	" " "	49.45
14.	Tuskegee L. and & Security Co.,	(Geo. Huddleston & E. H. Dryer	5,000.00
15.	E. V. Smith, et als. as Extrs. of W. T. Smith, Sr.	(Geo. Huddleston & E. H. Dryer	1,530.00
16.	Kate Rowland,	(Geo. Huddleston & E. H. Dryer	243.70
17.	Frank Matson,	Ditto	30.00
18.	Ed. Chambordeon,	Arthur L. Brown	1,500.00
19.	W. H. Hutchinson, as guardian of May L. Hutchinson,	(Geo. Huddleston & E. H. Dryer	10.25
20.	Chas. King,	(Geo. Huddl-ston & E. H. Dryer.	40.00
21.	Mrs. Henry Wallace,	Ditto	500.00
22.	Maggie Powell,	"	229.60
23.	Bertha Powell Jones,	"	72.25
24.	Edwin R. Jones,	"	13.57
25.	Felix Powell Jones,	"	59.53

Also claims of stockholders representing 65 shares, a list of which is hereinbefore set out in the statement of evidence.

Defendant offered in evidence copy of the Bill the complainant B. A. Alford et al., vs. Union Bank & Trust Company filed in the Circuit Court of Jefferson County, Alabama, February 26, 1910, in which Mrs. Kate Rowland, Miss May Powell, The G. M. Riser Mercantile Company, Charles King, A. L. Riser, Mrs. Henry Wallace et al., were plaintiffs. The material part of said Bill alleges the insolvency of the Union Bank & Trust Company, and asked for the appointment of a Receiver.

Defendant also offered the Decree of the Court in said cause appointing a Receiver for the Union Bank & Trust Company, the material part of which is the finding of the Court that the allegations and

charges of fact contained in the Bill are true and that the assets of the Union Bank & Trust Company constitute a trust fund for
277 the payment of its creditors, and appointing J. B. Cobb Receiver.

The decree further provided that all creditors of the Union Bank & Trust Company are required to propound and have allowed and decreed to them in this proceeding their respective claims, debts and demands on or before the 20th day of July, 1910, and directing the Receiver to forthwith mail to each such creditor a notice of this requirement, and to publish a notice thereof for three successive weeks in a news-paper published in Jefferson County, Alabama, of this requirement of the filing of claims. This decree was consented to by E. H. Dryer, among others, Solicitor for complainants in said cause.

Defendant also offered copy of an entry in cause No. 2036 in the Circuit Court of Jefferson County, Alabama, B. A. Alford, et al., vs. Union Bank & Trust Company, as follows:

"Come the undersigned persons who have heretofore filed claims with the Register of this Court for allowance and each for himself shows unto the court that at the time of filing his claim he did not fully understand the nature, scope or purpose of this cause, and that he now and hereby withdraws said claim, and asks that all evidences thereof or statements concerning the said claim which he may have filed in Court may be returned to him. Each of the undersigned claimants sets out opposite his name the amount for which said claim was filed, with an indication of the general nature of the claim:

J. H. Martin, Certificate of Deposit	$252.41
M. A. Gorman, Deposit, Certificate of Deposit	47.00
Mrs. R. M. Mackey, Certificate of Deposit	125.00
W. T. Brown, Certificate of Deposit, *Deposit*	150.00
	177.71
J. R. Davis, Sr., Certificate of Deposit	500.00
J. R. Davis, Jr., Certificate of Deposit	208.00
Certificate of Deposit	42.00
	25.00
	50.00
J. S. Elliott, Certificate of Deposit	300.00
Deposits	246.50
F. A. Gorman, Certificate of Deposit	2,000.00
Mrs. O. M. A. Gorman, Certificate of Deposit	500.00
Mack Kidd, Certificate of Deposit	401.75
J. C. Elliott, Certificate of Deposit	200.00
Certificate of Deposit	1,500.00
L. M. Clinkscales, Certificate of Deposit	50.00

This entry was made September 14, 1910.

Defendant also offered a list of claims withdrawn by order of said Circuit Court of Jefferson County, in cause No. 2036, B. A.
278 Alford, et al., vs. Union Bank & Trust Company, as follows: List of claims withdrawn by order of the Court January 16th, 1911.

Edwin R. Jones	$13.57
Miss Maggie Powell	214.00
Felix Powell Jones	59.55
Vivian Hayes Alford	4.00
Bertha Powell Jones	72.25
May Sims Hutchinson	10.20
Chas. King	40.00
Robt. V. Hagans	4.40
Mrs. Henry Wallace	500.00
And Mrs. Kate Rowland as to that part of her claim for which bears interest.	$243.70

Defendant offered a copy of the evidence of E. H. Dryer of June 23, 1911, in the case of Mrs. Kate Rowland, et al., vs. Alabama Trust & Savings Company, the material parts of which are as follows, to-wit:

Reference, June 23rd, 1911.

E. H. DRYER, being duly sworn, testified:

I am the attorney for the Receiver J. B. Cobbs, of the Union Bank & Trust Co., and have so represented him from the time of his appointment about Feb. 26, 1910. My connection has been such as to make me familiar with the general affairs and conditions of the estate of the Union Bank & Trust Co., and to a lesser extent with the affairs of the Alabama Trust & Savings Co. The Alabama Trust & Savings Co. was a banking corporation doing business with its principal place at Birmingham with some eleven branches located in various Alabama towns. On or about the 25th of Sept. 1909, it turned over to the City Bank & Trust Co. a State Bank doing a banking business at Birmingham, Alabama, all of its assets then in possession; the written memorandum was made at the time couched in very indefinite language, which, together with the transaction itself, constitutes the basis of the claim of its Receiver W. C. Sterrett against the assets in the possession and control of J. B. Cobb as Receiver of Union Bank & Trust Co. The City Bank & Trust Co., dating from Monday, Sept. 27th, 1909, took possession of all of such assets of the Alabama Trust & Savings Co., and used them in the conduct of its business until on or about Dec. 2, 1909, when it made a partial transfer to the Union Bank & Trust Co., which I shall explain later.

279 As I have already stated, the branches were actively conducted as going banking concerns for the period intervening from Sept. 25, 1909, to Feb. 24, 1910, resulting in daily changes of deposit and other accounts of customers, as well as bills and accounts receivable in the business. I am informed by the receiver of Union Bank & Trust Co. that from his investigation of the history and affairs of the Union Bank & Trust Co. from its organization to the present time it paid more than full value for the branches and assets which it received when it purchased them from the City Bank & Trust Co. on or about Dec. 2, 1909.

The theory upon which the receiver of Alabama Trust & Savings Company makes claim against the receiver of Union Bank & Trust Co. may be based upon two grounds, viz: 1st, that the transfer or

attempted transfer to the City Bank & Trust Co. was not made by the Alabama Trust & Savings Co., but by the unauthorized acts of its managing agent, and that title to all such property or proceeds of such property which can be traced into the hands of the Union Bank & Trust Co. is the property of Alabama Trust & Savings Co., and as such should go to its receiver. The two principal defences which would be interposed to this ground would be, first, that it is not true; that the Alabama Trust & Savings Co. acquiesced for the period of time running from Sept. 27th, 1909, until W. C. Sterrett filed his petition on May 16, 1911, in the suit in equity in which Cobbs is receiver. Suffering these branches to be conducted as going concerns by City Bank & Trust Co. from Sept. 27, 1909, to Dec. 2, 1909, by Union Bank & Trust Co. from Dec. 2, 1909, to Feb. 24, 1910, and the Receiver of Union Bank & Trust Co. to proceed with the administration of such assets as property of the Union Bank & Trust Co., and to pay out under the orders of the Court various and sundry administration expenses and the first dividend of 25%, a very large part of which went to creditors whose claims existed against the Alabama Trust & Savings Co. Sept. 25 and 27th, 1909, and who had been paid off with its consent either by City Bank & Trust Co., Union Bank & Trust Co., or partially by the receiver of the Union Bank & Trust Co. in the 25% dividend. The 2nd and alternative ground of the said claim of said receiver of Alabama Trust & Savings Co. against the Union Bank & Trust Co. is based upon the contention that if Alabama Trust & Savings Co. made the transfer to the City Bank & Trust Co., it was made with an intent to hinder, delay or defraud creditors, and that the receiver of Alabama Trust & Savings Co. as
280 their official representative may have the transfer set aside on that ground and reach such as can be identified and traced in the hands of the receiver of the Union Bank & Trust Co. The principal defences against the contention would be, first, that City Bank & Trust Co. was a bona fide purchaser for value without notice; second, that if the conveyance was fraudulent as to it, it actually paid to creditors of Alabama Trust & Savings Co. amounts aggregating the full value of the assets is received; third, that if the transfer was fraudulent both as to Alabama Trust & Savings Co. and City Bank & Trust Co. the Union Bank & Trust Co. was a bona fide purchaser for full value, and was not in its corporate capacity chargeable with notice.

Other grounds might be given, such as that the receiver in this case, who can not at most do more than represent both the stockholders and creditors of Alabama Trust & Savings Co., is barred on account of laches, having suffered the business to be conducted as aforesaid, and the estate of Union Bank & Trust Co. to be largely administered before taking any steps therein. A distribution of the 25% dividend in the Union Bank & Trust Co. case went to something like perhaps a thousand creditors, and restoration would be impossible.

Defendant also offered in evidence a report of J. B. Cobb, Receiver, in cause No. 3026 in the Circuit Court of Jefferson County, Alabama, B. A. Alford, et al., vs. Union Bank & Trust Company, the material part of which is as follows:

"In this connection the Receiver thinks it proper to call the atten-

tion of the Court to the fact that in a suit in equity pending in this Court in which Gray Barber, et al., are complainants and the Union Bank & Trust Company, et al., are respondents, the respective claimants therein set up that they are not creditors of the Union Bank & Trust Company, but of the Alabama Trust & Savings Company, and seem to be seeking by that suit to fix some sort of claim, lien or charge upon some undefined part of the assets of the Union Bank & Trust Company in the hands of this Receiver. The respective claimants in that suit and the amounts claimed by each of them are as follows:

Gray Barber	$1,481.16
B. F. Day	475.00
F. L. Morrell	561.06
J. W. Powers	2,346.96
M. V. Phillips	120.00
J. B. Davis	133.67"

281 The Receiver is advised by his counsel that the probabilities are that the said claims will be allowed as claims which are preferred under the constitution of the state, and be paid dividends only as such accordingly, and that the probabilities are that the said complainants in said suit of Gray Barber et al., will not be paid anything out of the assets of the Union Bank & Trust Company. This report was filed March 3, 1911.

The Ledger sheets of the account of the Second National Bank with The Alabama Trust and Savings Co. were offered in evidence, Exhibit S. The material part of same is as follows:

Alabama Trust and Savings Co.,

Birmingham.

Date, 1909.		Dr.	Cr.	Dr.	Balance. Cr.
June 8	Fwd.				17,259.96
11		17,200.00			95.96
12		12.50			83.46
14		15.00			68.46
15		.68			67.78
26		4.63			63.15
30			10.32		73.47
Jul- 2		10.00			63.47
9		55.33			8.14
17		20,515.28	28,000.00		7,492.86
19		7,401.94			90.92
21		1.10			89.82
23		.56			89.26
Aug. 3			2.65		91.91
6		1.10			90.81
11			1.07		91.88
13			1.07		92.95
19			68.34		161.29
30		390.00	375.83		147.12

Sept. 1		3.63		150.79
2	167.35	181.75		165.19
4		557.63		722.82
7	224.04	100.00		598.78
8	20.19			578.59
13		448.10		1,026.69
14	175.00	100.00		951.69
16	200.00			751.69
18		44.58		796.29
20	116.25			680.02
24	113.40			501.62
30	1,627.64		1,061.02	
Oct. 21		1,061.02		

282 *Certificate of Clerk.*

United States District Court for the Southern District of Ohio, Western Division.

I, B. E. Dilley, Clerk of the United States District Court for the Southern District of Ohio, Western Division, do hereby certify that the foregoing 39 pages contain a full, true and correct copy of the proceedings in the case of W. C. Sterrett, as Receiver of the Alabama Trust & Savings Company, against The Second National Bank of Cincinnati, Ohio, numbered 2126 on the docket of said court, as called for in the amended præcipe set out in full herein as the same appears in the record and files of that Court.

Witness my hand as Clerk and the seal of said Court, at Cincinnati, Ohio, this 25th day of November, in the year of our Lord one thousand nine hundred and sixteen (1916) and of the independence of the United States the one hundred and forty-first.

[SEAL.] B. E. DILLEY, *Clerk.*
By HARRY F. RABE, *Deputy.*

283 Proceedings in the United States Circuit Court of Appeals for the Sixth Circuit.

Appearance of Counsel in Case #2998.

(Filed Nov. 18, 1916.)

William C. Cochran, Clerk of said Court:

Please enter *my* appearance as counsel for the Appellant W. C. Sterrett as Receiver.

PHILIP & S. C. ROETTINGER,
Cincinnati, O.;
E. H. DRYER,
Birmingham, Ala.

Appearance of Counsel in Case #3001.

(Filed Nov. 24, 1916.)

William C. Cochran, Clerk of said Court:

Please enter our appearance as counsel for the —.

FERDINAND JELKE, JR.
LANDON L. FORCHEIMER.
CHARLES M. LESLIE.
JOSEPH B. FORAKER.
JOSEPH SAGMEISTER.

284 *Causes Argued and Submitted.*

(Oct. 8, 1917—Before Knappen and Denison, C. JJ., and McCall, D. J.)

These causes are argued together by Mr. Philip Roettinger and Mr. E. H. Dryer for W. C. Sterrett, Receiver, and by Mr. Lawrence Maxwell on behalf of the Second National Bank and are submitted to the Court.

Decree in Case #2998.

(Filed Dec. 4, 1917.)

Appeal from the District Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause be and the same is hereby reversed and the record remanded with directions to take further proceedings in accordance with the opinion of this Court. Appellee will recover costs of this Court.

285 *Decree in Case* #3001.

(Filed Dec. 4, 1917.)

Appeal from the District Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged and

decreed by this Court, that the decree of the said District Court in this cause be and the same is hereby reversed with costs and the record remanded with directions to take further proceedings in accordance with the opinion of this Court.

Opinion.

(Filed Dec. 4, 1917.)

286 Filed Dec. 4, 1917. Wm. C. Cochran, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

No. 2998 & 3001.

SECOND NATIONAL BANK OF CINCINNATI, OHIO, Appellant,

vs.

W. C. STERRETT, as Receiver of the Alabama Trust & Savings Company, Appellee.

Appeal from the District Court of the United States for the Southern District of Ohio.

Submitted October 8, 1917. Decided December 4, 1917.

Before Knappen and Denison, Circuit Judges, and McCall, District Judge.

KNAPPEN, *Circuit Judge:*

The plaintiff, as receiver of the Alabama Trust & Savings Company, filed his bill in the court below to recover sums for which he alleged the National Bank was liable on account of dealings between that bank and the Savings Company and its officers. Upon final hearing on pleadings and proofs, the District Court found defendant liable for the application of a balance of the Savings Company's deposit in the National Bank, upon paper held by the latter bank on which the Savings Company appeared as principal maker, but which was found to have been given for the benefit of certain of the
287 Savings Company's officers. Plaintiff's remaining claims were rejected. Both parties have appealed.

At the outset we are met with defendant's contention that plaintiff is without authority to maintain this suit. The Savings Company is a banking corporation organized under the laws of Alabama. In the year 1911, upon a bill filed against it in a state chancery court of Alabama, by certain of its creditors, alleging its insolvency, plaintiff was appointed receiver, and later was given, by the Alabama court, discretionary authority to prosecute the instant suit, which was accordingly brought in a Federal District Court in Ohio, there having been no receivership proceedings, ancillary or otherwise, in that state.

It is the settled rule that a mere chancery receiver is but an officer of the court appointing him, and that in the absence of some con-

veyance or statute vesting in him title to the debtor's property he cannot sue in the courts of a foreign jurisdiction for its recovery upon the mere order of the appointing court, or without other authority than that arising from his appointment as receiver; and that in the absence of actual conveyance (there was none in this case) the question whether the receiver has title is governed by the statutes of the state by whose court the appointment was made. *Booth v. Clark*, 17 How. 321; *Hale v. Allinson*, 188 U. S. 56; *Great Western Mining Co. v. Harris*, 198 U. S. 561, 573; *Keatley v. Furey*, 226 U. S. 399, 403. On the other hand, it is equally well settled that where the statute under which the appointment was made confers such title on the receiver, he may sue as of right in the courts of the foreign jurisdiction; and such courts will, in respect to such question of title, accept the construction put upon the statute by the highest court of the state. *Bernheimer v. Converse*, 206 U. S. 516, 534; *Converse v. Hamilton*, 224 U. S. 243, 256 and following. The question is—under which classification does plaintiff receiver come?

Section 3509 of the Code of Alabama (1907) provides that "the assets of insolvent corporations constitute a trust fund for the payment of the creditors of such corporation, which may be marshalled and administered in courts of equity in this state."

Section 3511, which relates to proceedings for voluntary dissolution of corporations by action of stockholders, provides for the appointment by the chancery court of a receiver of "all the books, property and assets of the corporation", and that such receiver
288 shall *"under the direction of the court"* collect all debts due to, and sell all the property of, the corporation, paying its debts in full or ratably and dividing the residue among stockholders.(1)

Section 3512, which relates to the dissolution of insolvent corporations generally, provides for the appointment of a receiver of all the corporate property and assets, requiring that officer to exercise and perform, *"under the direction of the court"*, the powers and duties required of receivers under section 3511, and to "otherwise manage the affairs of the corporation pending final settlement thereof *as the court shall direct.*"

Section 3560, which is confined to proceedings against insolvent banks, requires the attorney general (upon direction of the governor, based on the state treasurer's finding of insolvency) to institute, "in a court having jurisdiction in the county where the bank or parent bank is located", proceedings "to put the bank in the hands of some competent person"; such appointee being required to give bond in an amount to be fixed by the judge, and to "immediately take charge of the business of said bank, collecting its assets and paying off its liabilities, *under the law and rules of such court*". It was under these statutes (although upon bill by private creditors) that plaintiff's appointment was made, and by which the question of his title is to be tested.

The decree, after reciting the corporate organization of the Saving Company under the general laws of Alabama, its insolvency, its sus

(1) All italics in this opinion ours.

pension of business and inability to resume the same with safety to the public, that its assets constitute a trust fund for the payment of its creditors and "should be marshalled and administered in this court", that upon final settlement it should be dissolved and that a receiver "should now be appointed to administer its estate", directs that plaintiff "be and he is hereby appointed receiver of defendant, and empowered and directed to demand and take into his possession all the defendant's assets and property to which it is entitled and to recover the same, to be reduced to money and administered *under the further order of the court*", with express authority to employ counsel and to bring action at law or in equity "as he may be advised", and to incur expense necessarily incident thereto.

It will be seen that these statutes do not expressly confer
289 title upon the receiver; that they, at least at first view, suggest generally a court direction and control—an ordinary chancery receivership,—and that the order of appointment specifically provides for the administration of the bank's estate, including recoveries by suit, under the court's order.

In Oakes v. Smith, 176 Ala. 39, which involved the right of a debtor to set off a debt of the bank acquired after its insolvency against a debt due the bank, the court, recognizing the rule that in ordinary cases of receivership the receiver gets no title to the debtor's assets, passed by the question whether the receiver was vested with the legal title, basing its decision upon the trust-fund nature of the assets of the insolvent bank, which of itself forbade such set-off.

In Montgomery Bank & Trust Co. v. Walker, 181 Ala. 368, which involved the power of the superintendent of banks, under Sec. 10 of Act No. 84 of the General Acts of Alabama of 1911 (in effect when the instant receivership was created) to maintain suit to avoid a fraudulent transaction made by the bank's officials, the Court cited National Bank v. Kennedy, 17 Wall. 19, as asserting the power of a receiver under the National Bank Act, "as statutory assignee", to collect the assets of the bank; but the opinion contains no suggestion that the superintendent of banks was in fact such assignee. On the contrary, in asserting the constitutionality of the act, as against an alleged lack of due process, the Court expressly said (p. 378) that it did not "understand the act as making this proceeding operate as a change in the ownership or legal title to the property, but the superintendent is in reality a receiver, who takes charge of the bank for the benefit of the stockholders, depositors and other creditors".

In the later case of Cobbs, Receiver, v. Vizard Investment Co., 182 Ala. 372, brought under section 3509, supra, for the administration of an insolvent bank, in denying the right of the receiver (for lack of interest in the distribution) to appeal from a decree allowing the claim of a creditor, the Court (p. 374) characterized the receiver as "the mere agent of the court for the collection and distribution of the assets of the insolvent corporation under orders of the court which fully protect him", etc., saying (p. 375) "The receiver is the mere creature of the court. He must give heed to his master's voice".

In the still later case of Coffey v. Gay, 191 Ala. 137, which
290 involved the right of a receiver of an insolvent bank, appointed under section 3560, supra, to appeal from an order in

the principal suit denying the liability of stockholders for unpaid subscriptions, the proposition involved in Cobbs v. Vizard Investment Company was reasserted, and upon the same grounds there announced; the Court quoting from the opinion in that case the language above set out, and further saying that "this suit the receiver was without authority to bring until he first obtained permission of the court of his appointment".

True, in the still later case of Hundley v. Hewitt, 195 Ala. 647, which involved the right of a receiver of an insolvent insurance company, appointed under section 4552 of the Code, to recover unpaid stock subscriptions (under section 3509 supra, and section 3744), the Court, in support of the existence of such power, quoted the definition of the title of the trustee in bankruptcy as contained in Cartwright v. West, 173 Ala. 202, and expressed (p. 654) the opinion that "the receiver appointed in this case, acting under orders of the court appointing him,—a court of competent jurisdiction, with full power to settle the affairs of the dissolved corporation—has rights and duties of a kindred character to those of a trustee in bankruptcy, *so far as the question here concerned is involved.*"; but we find nothing in the opinion asserting that the receiver holds title to the property of the insolvent bank; the implications are all to the contrary.

The instant case is readily distinguishable from cases relied upon by plaintiff. In Relft v. Rundell, 103 U. S. 222, the "temporary agent and receiver" of the insurance company (p. 223) was held (p. 225) to be "the statutory successor of the corporation for the purpose of winding up its affairs". In Bernheimer v. Converse, supra, and in Converse v. Hamilton, supra, it was held that under the Minnesota statute, as interpreted by the Supreme Court of that state, as well as by the Supreme Court of the United States, "the receiver is not the ordinary chancery receiver or arm of the court appointing him, but a quasi assignee, and a representative of the creditors". (And see Courtney v. Croxton,—C. C. A. 6—239 Fed. 247, 249.)

In Howarth v. Lombard, 175 Mass. 570, the bank's receiver, which the Washington court (whose statute was involved) called a "quasi assignee for creditors," was declared by the Massachusetts Court (p. 579) to be "the owner of the legal title to this fund as a trustee
291 for the creditors". In Howarth v. Angle, 162 N. Y. 179, the Washington statute was similarly construed.

There is a marked, and not unnatural, tendency in the courts in favor of the construction, where possible, of statutory proceedings for the dissolution of corporations (as distinguished from ordinary creditors' suits) as vesting in the receiver the title to corporate assets (In Mining Co. v. Harris, supra, the receiver was appointed in a creditor's suit); and were it not for the decisions in Bank v. Walker, supra, Cobbs v. Investment Co., supra, and Coffey v. Gay, supra, such construction of the Alabama statute would present less difficulty. But this construction seems impossible without disregarding these three decisions, and in the face of the fact that neither of the other Alabama decisions cited contains anything necessarily inconsistent with the holdings in the three cases mentioned. In so saying, we have not overlooked the fact that in Cobbs v. Investment Co. and Coffey v. Ga

the orders sought to be appealed from were made in the court of principal administration.

We are thus constrained to hold that the Alabama statute confers upon the receiver in the instant case no title to the bank's assets, and thus no right to maintain the instant suit; for (as said in Gt. Western Minning Co. v. Harris, supra, in which the appointing court had authorized the action by the receiver), in the absence of statutory authority therefor, the receiver's right "to sue in a foreign jurisdiction is not recognized upon principles of comity, and the court of his appointment can clothe him with no power to exercise his official duties beyond its jurisdiction. The ground of this conclusion is that every jurisdiction, in which it is sought by means of a receiver to subject property to the control of the court, has the right and power to determine for itself who the receiver shall be, and to make such distribution of the fund realized within its own jurisdiction as will protect the rights of local parties interested therein, and not permit a foreign court to prejudice the rights of local creditors by removing assets from the local jurisdiction without an order of the court or its approval as to the officer who shall act in the holding and distribution of the property recovered" (p. 576).

It follows that in the present state of the record the defendant is entitled to a dismissal of the suit, notwithstanding its apparent
292 failure to call to the attention of the court below the proposition on which our decision is based: for if plaintiff had no title and no right of action in the court below, that court was without power to render decree in his favor. (See Gt. Western Mining Co. v. Harris, supra, at pp. 577 and 578.) A defense that plaintiff has no title to the asserted right of action is always open.

A disposition by this court of the appeal without determination of the merits is unfortunate, and it is with reluctance that we have reached the conclusion that there is no escape from it. But lack of title in plaintiff is not a mere technicality, in the ordinary meaning of that term, for there is always, theoretically at least, a possibility that defendant may be subjected to further suit by the owner of the title and right of action. The present difficulty could readily have been avoided by ancillary receivership; and the dismissal of the case will not necessarily preclude further proceedings. Whether an ancillary receivership, and an ancillary bill thereunder, would save the present suit from dismissal we need not decide. (See Coal & Iron Co. v. Reherd—C. C. A. 4—204 Fed. 859, 882.) Such a question, if presented, would properly be addressed to the court below; and counsel have not been heard upon it here.

The decree of the District Court is reversed, and the record remanded to that court with directions to take further proceedings not inconsistent with this opinion.

293 *Petition for Rehearing.*

(Filed Dec. 26, 1917.)

294 United States Circuit Court of Appeals for the Sixth Circuit.

Nos. 2998 and 3001.

W. C. STERRETT, as Receiver of The Alabama Trust & Savings Company, Appellant,

vs.

SECOND NATIONAL BANK OF CINCINNATI, OHIO, Appellee.

Appeal from the District Court of the United States for the Southern District of Ohio.

Petition of Appellant for Rehearing.

Having carefully examined the opinion of the Honorable Court, we think that we may with propriety ask the Court to consider whether this case be not one in which it will be proper to grant a rehearing to the appellant on the ground that:

1. The opinion on the file, if allowed to stand, disposes of a case involving, with interest, about $200,000, upon a point not involving the merits, which was not pleaded or suggested below or above by pleading, argument or otherwise from the time suit was instituted May 11, 1912, until October 8, 1917, when, as counsel for appellant arose in this court to make oral argument, adversary counsel
295 verbally gave notice that appellee would use in argument the case of Great Western Mining & Manufacturing Company v. Harris, 198 U. S., 561. Until after the oral argument was concluded and the cause submitted, counsel for appellant had no reasonable opportunity to examine, and no opportunity whatever to find and cite, other adjudicated cases or to argue their application.

2. Although thus deprived of fair opportunity to be orally heard, counsel for appellant proceeded with diligence to prepare and file a short brief, giving the material excerpts from Alabama statutes in force, governing the status of appellant as receiver of the trust fund consisting of all of the property and assets of the insolvent bank, Alabama Trust & Savings Company, and citing the leading and governing decisions of the Supreme Court of the United States (Bernheimer v. Converse, 206 U. S., 516; Converse v. Hamilton, 224 U. S., 243), the leading state cases, which were followed by and upon which these United States Supreme Court cases are based (Howarth v. Lombard, 175 Mass., 570; Howarth v. Angle, 162 N. Y. 179), and the Alabama Supreme Court cases in line, and which seemed to us to be conclusive, (Oates v. Smith, 176 Ala., 39; Hundley v. Hewitt, 195 Ala., 647), as well as the Fifth Circuit Court o

Appeals case, within whose territory Alabama is situated (Goss v. Carter, 156 Fed., 746.)

3. From a careful reading of the printed opinion of the court on file in this case, we think with propriety we may safely assume that, but for three other Alabama cases cited and discussed in the opinion (Montgomery Bank & Trust Company v. Walker, 181 Ala., 368; Cobbs, Receiver, v. Vizard Investment Company, 182 Ala., 372; Coffey v. Gay, 191 Ala., 137), this court would have come to a different conclusion and would have proceeded to consider the ap-
296 peal on its merits. The first and only opportunity we can have to show the extent of those decisions and their bearing upon the point involved is upon a rehearing—orally if the court will permit—and only by brief appended to this petition, if the court will not permit oral argument upon the subject.

4. The vital importance of a sound and proper disposition of this question by this court lies in the fact that no appeal can be taken to the Supreme Court of the United States (Herrmann v. Edwards, 238 U. S., 107); and, unless this court permits the fullest and fairest presentation, there is the greatest danger of its being finally disposed of here upon an erroneous interpretation and application of the three Alabama cases last above referred to.

5. We may, with propriety and due deference, call attention to the fact that in the opinion on the file the court has confounded the right or title (legal or that of quasi-assignee) given by the Alabama statutes to this receiver with the authority given by those statutes to the court to supervise and direct the exercise of the trust confided by the statutes in the receiver; and has failed, apparently, to notice that the state statutes, upon which the United States Supreme Court cases, supra, rely are almost identical in verbiage and quite the same in substance as the Alabama statutes upon the same subject; and has failed to observe, if this plain distinction be kept in mind, that all the Alabama cases are not only in perfect harmony, each with the other, but are as well in perfect accord with the decisions of the Supreme Court of the United States and of the Supreme Courts of the states, upon whose opinions the highest federal court relies for its own. Under the rule of this court, we are not permitted here to show this by argument; but we have appended a brief, wherein
297 for the convenience and better information of the court we have quoted for comparison the statutes of these foreign states and of Alabama, in order that it may be readily seen that no real difference between them exists.

6. The court will further be pleased to observe that the Alabama cases (supra) in the opinion on the file, under the influence of which this court seems to feel constrained to conclude that this receiver has no title nor is a quasi-assignee in the administration of a trust fund, go in substance no further than to hold that when the trust is under administration in the court, the receiver had no authority to bring an independent suit or to take an appeal, without first obtaining the leave of the court, in which respect these decisions are in perfect harmony with the Alabama statute which gives over to the receiver the full administration of the trust under the direction of the court.

Wherefore, upon a careful re-examination, and upon giving a correct interpretation to the Alabama statutes and decisions, considered in connection with the decisions of the Supreme Court of the United States upon the subject, and the cases upon which that court relies, this court will grant, and the appellant, W. C. Sterrett, as Receiver of Alabama Trust & Savings Company, prays this Honorable Court to grant, to him a rehearing of said cause.

E. H. DRYER AND
PHILIP ROETTINGER,
Attorneys for Appellant (Plaintiff Below).

I, Philip Roettinger, of counsel for the appellant herein, W. C. Sterrett, as Receiver of Alabama Trust & Savings Company, plaintiff below, do hereby certify that in my judgment the foregoing
298 petition for a rehearing is well founded and that the same is not made or interposed for delay.

PHILIP ROETTINGER.

Brief in Support of Foregoing Petition.

Inasmuch as counsel for appellant were taken by surprise and have had no opportunity whatever to explain in oral argument to the court the extent to which the United States Supreme Court has gone upon the particular point under consideration, nor any opportunity whatever to discuss orally or in brief the substance of the holdings of the Alabama Supreme Court in the three cases, under the influence of which this court felt constrained to conclude that this receiver can not, without ancillary proceedings and appointment, sue in Ohio, we feel we are entitled to receive, and are confident that we shall be given, as full and as impartial consideration as if the opinion on the file had not been rendered.

In order the better to understand the subject clearly, it is well first to examine the language of the other state statutes and the interpretation placed upon such language by the state Supreme Courts and by the Supreme Court of the United States, adopting and following these state court decisions. These statutes are of the states of Washington and of Minnesota. We shall notice first the statutes of Washington and next of Minnesota. *All italics hereinafter used are ours.*

State of Washington Statute.

The Washington statute in cases of insolvent banks provided for court appointment of a receiver with
299 "power, *under control of the court,* to bring and defend actions, take and keep possession of property, receive rents, collect notes, and generally to do such acts, respecting the property in his hands, *as the court shall authorize.*"

In the case of *Howarth v. Angle,* 162 N. Y., 179, 182; 47 L. R. A., 725; 56 N. E., 489, a Washington receiver of an insolvent state bank, under appointment of a court of that state, after being author-

ed so to do by an order of the court of this appointment, and without ancillary proceedings or ancillary appointment in New York, brought his suit in the latter state; and the objection was made there that, being an ordinary chancery receiver, acting only under the control and authority of the state court of Washington, he had no title and could not sue in the foreign state. It is to be observed that the statute did not in terms vest him with any title, legal or equitable, but the statute did give him authority, *under control of the court*, to bring and defend actions, take and keep possession of the property, receive rents, collect notes, and generally to do such acts, respecting the property in his hands, *as the court should authorize*. The New York court held he was a *quasi*-assignee and after being authorized by the court of his appointment, under whole control and direction he administered the trust fund, he could maintain the action in the state of New York, without ancillary proceedings or appointment there. It is to be observed that under that statute, though not vested with legal title, he was held to be *quasi*-assignee, by reason of the authority given him by statute, after his appointment and acting under the authority and direction of the court, to collect the property and assets of the insolvent bank; and when the court having charge of the administration had given him leave or directed him to proceed, his rights to collect were conferred by the statute authorizing his appointment. The court of his appointment had and exercised in the first instance the discretion of selecting the individual in the form of a receiver, to whom, when so selected, the statute gave the power, under the direction and control of the court of his appointment, to collect and distribute the assets. It is true the statute in terms authorized him to bring and defend actions, but the Legislature was careful to say that the exercise of the power to bring such actions was to be controlled by the court having the administration of the trust. It would be a refinement of technicality to argue that if the statute had not in terms authorized the bringing and defending of actions, such receiver could not bring and defend actions, though empowered by the statute to "take and keep possession of property, receive rents, collect notes, and generally to do such acts, respecting the property in his hands, *as the court shall authorize*." When the statute gives the receiver authority to collect and distribute, it confers the right to sue as incidental; for, without such right, there would be no such power. The right to sue resides in, and must be exercised by, the receiver, not by the court, although leave to do so must first be obtained from the court having supervision of the administration of the trust fund. The power to collect, and to sue to make the power effective, does not reside in, and is not derived from, the court. It is given by statute to the receiver, in the exercise of which he acts by legislative authority, but under the direction of the court. In such cases some of the courts have not been willing to say he has title, but have called him a *quasi*-assignee. Having *statutory* authority to collect it follows, as a corollary, payment to him is authorized and absolves the defendant from double liability.

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301 The case of *Howarth v. Lombard*, 175 Mass., 570; 49 L. R. A., 301; 56 N. E., 888, was by the same receiver, on a like cause of action as *Howarth v. Angle, supra*, brought in the state of Massachusetts. The Supreme Court of that state said:

"He is charged with the administration of a trust fund which does not take form nor come into actual existence until after his appointment, and *he is the only person who can collect it.* By virtue of his official relation to the corporation and its creditors, he is the owner of the legal title to this fund, as a trustee for the creditors. *A suit could not have been brought in the name of the corporation, and he is the only person who can now, or who ever could legally demand and collect the money.* We are of opinion that the action is rightly brought in his name."

This language needs no comment. The opinion cites and concurs in *Howarth v. Angle*, 162 N. Y., 179, *supra*.

State of Minnesota Statute.

The principal parts of the Minnesota statute are set forth in the margin of the report of *First National Bank v. Converse*, 200 U. S., 425, which we ask the court to read. Section 4 reads as follows:

"Said order shall direct the assignee or receiver *to proceed to collect* the amount so assessed against each share of said stock from the parties liable therefor; and shall direct and authorize said assignee or receiver, in case of the failure of any party liable upon or on account of any share or shares of said stock to so pay the
302 amount so assessed against the same within the time specified in said order, to prosecute action against each and every such party so failing to pay the same, wherever such party may be found, whether in this state or elsewhere."

Though the verbiage is not identical with, this statute is in substance the same as that of, the state of Washington, referred to above. In determining its meaning the Supreme Court of the United States said in the cases of *Bernheimer v. Converse*, 206 U. S., 516, 534, and *Converse v. Hamilton*, 224 U. S., 243, 260:

"It is objected that the receiver can not bring this action, and *Booth v. Clark*, 17 How., 322; *Hale v. Allison*, 188 U. S. 56, and *Great Western Mining Co. v. Harris*, 198 U. S., 561, are cited and relied upon. But in each and all of these cases it was held that a chancery receiver, having no other authority than that which would arise from his appointment as such, could not maintain an action in another jurisdiction. In this case the statute confers the right upon the receiver, as a *quasi*-assignee, and representative of the creditors, and as such vested with the authority to maintain an action. In such case we think the receiver may sue in a foreign jurisdiction. *Relfe v. Rundle*, 103 U. S., 222, 226; *Howarth v. Lombard*, 175 Massachusetts, 570; *Howarth v. Angle*, 162 N. Y., 179, 182."

and in the latter case added:

"And in *Converse v. First National Bank of Suffield,* 212 U. S., 567, where, in a similar action, the Supreme Court of Errors of Connecticut had given judgment against the receiver, this court reversed the judgment on the authority of *Bernheimer v. Converse, supra.*"

303 Alabama Statutes.

The plaintiff in this suit is the receiver of a trust fund created by an Alabama statute, which (Code 1907, Vol. 2) reads as follows:

"3509. * * * The assets of insolvent corporations constitute a trust fund for the payment of the creditors of such corporations, which may be marshalled and administered in courts of equity in this state."

His right and power to collect all debts due the corporation, reduce the property to money, pay the debts ratably, and distribute the surplus to stockholders, is also conferred by statute. Section 3512 of the Code of 1907 reads as follows:

"3512. * * * The court * * * may appoint a receiver of all the property and assets of the corporation * * * (who) under the direction of the court, must exercise the same powers and perform the same duties as are required of receivers in the next preceding section, and otherwise manage the affairs of the corporation pending final settlement thereof as the court shall direct. * * *"

The preceding section on this subject provides:

"3511. * * * shall appoint a receiver of all the books, property and assets of the corporation. * * * (who) shall, under the direction of the court, collect all debts due the corporation, and *sell all the property, real and personal,* of the corporation, pay the debts thereof ratably or in full as the funds realized may admit, *and divide the residue* after the debts and costs are paid, ratably *among the*
304 *several classes of stockholders,* according to the amount owned by each and according to the preferences, if any, of the several classes as provided in the certificates of incorporation."

The decree (Rec., p. 37) adjudicates and orders:

"* * * that defendant (Alabama Trust & Savings Company) is insolvent; that its assets constitute a trust fund for the payment of its creditors, and should be marshaled and administered in this court; that defendant is a corporation organized under the General Laws of Alabama; *that defendant corporation upon final settlement should be dissolved,* and that a receiver should now be appointed to administer its estate; that said defendant has suspended business and is not about to resume the same, and can not resume the same with safety to the public; that W. C. Sterrett be, and he is hereby, appointed receiver of defendant, and empowered and directed *to demand and take into his possession all of defendant's assets and property to which it is entitled and to recover the same,* to be reduced to money and administered under the further order of this court, and, to that end, that the said receiver may employ counsel and may bring such actions at law or in equity as he may be advised and incur such expense as may be necessary as an incident thereto."

Later, March 8, 1912 (Rec., p. 38), he was directed to bring this suit.

The receiver, being authorized by the statute, to proceed, under the direction of the court, "to collect *all* debts due the corporation, and sell *all* the property, real and personal, of the corporation, pay the debts thereof ratably or in full as the funds realized may admit, and divide the residue, after the debts and costs are paid,
305 among the several classes of stockholders, according to the amount owned by each, and according to the preferences, if any, of the several classes as provided in the certificates of incorporation," is the person designated by law to take the property of the insolvent corporation, and hold and dispose of it in trust for the use and benefit of creditors, and other parties interested. The law which clothed him with this trust is, in legal effect, part of the charter of the corporation. He is the trustee of an express trust, with all the rights which properly belong to such a position. Though he was selected by the court for the administration of the trust estate, his authority to collect, liquidate, and distribute, does not come from the decree of the court, but from the statute. He is, in fact, the corporation itself for all the purposes of winding up its affairs. *Relfe v. Rundle*, 103 U. S., p. 225.

Now, in the absence of any Alabama decisions on the question, it may safely be assumed, under the state and federal decisions cited above, to which may be added *Goss v. Carter*, 156 Fed. (5 C. C. A.), 746, 750-751, that no court would hesitate to decide that an Alabama receiver, deriving his authority to collect, reduce to money and distribute all the assets and property of an insolvent corporation from the statute, holds title, or is a *quasi*-assignee of such trust fund.

The next question for consideration is whether or not the decisions of the Supreme Court of Alabama have weakened or destroyed the prevailing rule. We shall first discuss the three cases referred to in the opinion of the court, taking them *seriatim*.

The case of *Montgomery B. & T. Co. v. Walker*, 181 Ala., 368, was where the Superintendent of Banks, under the authority conferred upon him by the Alabama statute and without previous resort
306 to the court, brought suit to recover assets of the insolvent bank. His right to institute such suit was held to be authorized by reason of the fact that the statute under such circumstances authorized him to collect all debts due and claims belonging to the bank and to do such acts as were necessary to conserve its assets and business. That case followed the Supreme Court of the United States concerning the duties of a receiver of a national banking association, who was held to be, in substance, a statutory assignee, with power to sue in his own name to recover assets. It is precisely this which we contend for in this case. True it is, the opinion there said the proceedings did not operate to change the ownership or legal title to the property, but the court did there hold that the superintendent is in reality a receiver and, in effect, a statutory assignee for the purpose of taking charge of the bank for the benefit of its stockholders, depositors, and other creditors, by reason of the authority given him to collect its assets and to do such acts as were necessary to conserve its assets and business. The statute, under which the plaintiff in this case derives his authority, is quite as broad and as comprehensive; though, before proceeding to assert the rights given him by the stat-

ute, it is necessary for him to obtain leave of the court, as it was necessary for such receiver to obtain leave of the courts under the Washington and Minnesota statutes. While this case holds that there is no change of the ownership or legal title to the property, it does not hold that the Superintendent of Banks is not *quasi*-assignee. On the contrary, it holds him to be a statutory assignee with authority to sue, by reason of the fact that he is given by the statute authority to collect and distribute.

The case of *Cobbs, Receiver, v. Vizard Investment Com-*
307 *pany*, 182 Ala., 372, was a case where a creditor filed his petition for the allowance of his claim in the court in which the trust fund was administered. The court of administration held the claim good, and the receiver, without direction of the court, took an appeal to the Supreme Court. The only question involved for decision was whether or not the receiver could take such appeal without first obtaining leave. It is clear that under the Alabama statutes, quoted *supra*, he had no right to take such an appeal without first obtaining leave or direction of the court, notwithstanding the allowance of the claim might affect the amounts which might ultimately be paid to the creditors. The authority of the receiver to collect assets was not involved in that case, directly or indirectly, and in taking the appeal without the direction of the court, he was proceeding contrary to the statute under which he derived his authority.

The third of the cases is that of *Coffey v. Gay*, 191 Ala., 137, which also was a case where the receiver sued by independent suit in the court of administration, but took an appeal without obtaining the leave or direction of the court. Naturally, that case was disposed of upon the authority of *Cobbs, Receiver, v. Vizard Investment Company, supra*, and the disposition was proper, for the simple and obvious reason that before he could take such an appeal he must have had the leave or direction of the court of his appointment, under the Alabama statute.

It thus appears that when these three Alabama cases are considered, in connection with the Alabama statutes and the subject-matter under consideration of the court for disposition, there is no conflict between them and the Supreme Courts of the United States, Massachusetts and New York; but the position of the Supreme Court of Alabama is made clair and conclusive when we read the case of *Oates v. Smith*, 176 Ala., 39, which preceded, and the case
308 of *Hundley v. Hewitt*, 195 Ala., 647, which came after these three cases.

In the case of *Oates v. Smith*, 176 Ala., 39, Smith was the receiver of an Alabama insolvent bank, acting under the same statutes and whose administration was pending in the same court as that of the plaintiff in this case. We do not desire to claim more for this decision than may be reasonably gathered from it. On page 46 of the opinion occurs this language:

"the trust fund theory of the statute, as well as the equitable rights of the receiver, just as effectually hold and protect the assets of the bank for the purposes in view as if the legal title were vested in the receiver. In a similar case, however, the Supreme Court of

Massachusetts has held that such a receiver 'is to be regarded as a *quasi* assignee, and as being vested with the legal title to the assets of the bank.' *Howarth v. Lombard,* 175 Mass., 570, 579, 56 N E., 888, 891, 49 L. R. A., 301. And this ruling seems to meet with the approval of Mr. High. High on Receivers (4th Ed.), § 317c."

It will be noticed that the court expressly holds that the *equitable rights* of the receiver (under the statute) just as effectually hold and protect the assets of the bank for the purposes in view as if the *legal title* were vested in him. It is also to be noticed that the court cites with approval as "a similar case" *Howarth v. Lombard,* 175 Mass., 570, 579, *supra,* which is the same case upon which the Supreme Court of the United States relies in the cases of *Bernheimer v. Converse,* 203 U. S., p. 534, and *Converse v. Hamilton,* 224 U. S., p. 260. This case alone is sufficient to show the view of the Supreme Court of Alabama. when the precise question is under its consideration.

309 The case of *Hundley v. Hewitt,* 195 Ala., 647, was where a receiver of an insolvent insurance company, such as the plaintiff in this case, and appointed by the same state court, after first being authorized and directed so to do, instituted suit to collect an undischarged stock liability as a part of the assets and property of the corporation. In disposing of the question of whether or not such a receiver, upon first receiving the direction of the court so to do, had the right by virtue of the statute to institute and prosecute the suit, the court said:

"In the case of *Montgomery Bank & Trust Co. v. Walker,* 181 Ala., 368, 61 South., 951, the first assignment of demurrer to the bill challenged the right and authority of the superintendent of banks to maintain the bill in that case. There was no express authority in the statute, under which the superintendent of banks was proceeding, for him to maintain a suit of the character there involved, yet he was authorized to collect all debts and claims belonging to the bank and 'to do such acts as are necessary to conserve its assets and business.' This court in that case found no difficulty in holding that the superintendent of banks had authority to maintain suit. So here, a receiver is appointed by a court having full jurisdiction, and in conformity with the statute, which directs the court to make all orders and decrees needful in the premises and appoint receivers to take possession of the property and to settle its affairs under the orders of said court.

"The statute clearly looks to a final settlement of the affairs of the corporation, and certainly its affairs could not be settled until its debts are collected. In *Cartwright v. West,* 173 Ala., 202, 55 South., 918, this court, speaking of the rights and duties of a trustee in bankruptcy, said: 'The trustee in bankruptcy in a sense

310 is a representative both of the bankrupt and the creditors. As such he succeeds in right and title to the bankrupt's estate for the benefit of his creditors. He may, as a general rule, maintain all actions, both at law and in equity, for the recovery and preservation of the assets, both real and personal, of the bankrupt's estate that the bankrupt himself, but for the bankruptcy, could have

maintained. Even more, he may maintain an action the bankrupt could not, where, as in the present case, he seeks to avoid the conveyances made by the bankrupt in fraud of his creditors. In this latter instance it can not be said that the trustee is a representative of the bankrupt, for he (the bankrupt) could not maintain such a bill, nor in any legal or equitable proceeding become a beneficiary of his own fraudulent act.'

"We are of the opinion that the receiver appointed in this case, acting under orders of the court appointing him—a court of competent jurisdiction, with full power to settle the affairs of a dissolved corporation—has rights and duties of a kindred character to those of a trustee in bankruptcy so far as the question here concerned is involved, and that the above-quoted language is applicable to the receiver in this cause. We are therefore clearly of the opinion that the suit is property brought by this receiver."

With the utmost deference to this Court, in commenting upon this case in the first paragraph on page 5 of the printed opinion on the file, we may ask if the question there involved and decided was not the identical question under consideration here; and whether or not it may be considered as deciding that if the receiver does not hold *title* to the property, it does hold necessarily that he is *quasi*-assignee, with the same authority, after obtaining leave of the court, that a National bank receiver has; for it uses in support
311 of the conclusion the case of *Montgomery Bank & Trust Company v. Walker*, 181 Ala., 368, which in turn holds that, because the statute gives the Superintendent of Banks the authority to collect debts and claims and to do such acts as are necessary to conserve its assets and business, after he shall have taken charge under the statute, he is just as much a statutory assignee for such purposes as a receiver of a National banking association.

As already shown herein, Section 3511 of the Code of Alabama of 1907, Volume 2, provides not only that the receiver shall "collect all the debts," but shall "sell all of the property, real and personal, of the corporation," and shall "divide the residue * * * ratably among the several classes of stockholders." The chancery court appointing Sterrett as receiver decreed (Rec., p. 37) "that defendant corporation upon final settlement should be dissolved," and later in due course of administration (Rec., p. 213) that, after the creditors were paid, the balance was to be divided and distributed to the stockholders whose claims were filed in the administration proceedings. We therefore have before us a statute which vests in the receiver all the power, authority, or title which the corporation had, to-wit, the power to collect all of its debts, sell all of its property, real and personal, and, after paying its debts, to make a division of the residue among the stockholders. Such statutory authority could be exercised only by one holding legal title or one who by law occupied the situation of *quasi*-assignee.

This court, for the Sixth Circuit, in the case of *Kirtley v. Holmes*, 107 Fed., 1, in an opinion delivered by Mr. Justice Day, then Circuit

Judge, is thoroughly committed to this position. There the
312 statute did not in terms authorize the appointment of a receiver, and of course did not use the comprehensive language of the Alabama statute, investing in him the legal title or making him a statutory assignee; but it was clear that, in order to make the statute completely effective, the court in administering the statute must or ought to appoint a receiver, in order to effect the collection designed by the statute. The court, therefore, looked to the substance rather than to the form of the matter, and held that such a receiver could sue in a foreign jurisdiction; and, in support of its conclusion, cites the case of *Howarth v. Angle*, 162 N. Y., 179, and *Howarth v. Lombard*, 175 Mass., 570; the latter of which cases is the one which the Supreme Court of Alabama cites with approval in the case of *Oates v. Smith*, 176 Ala., 39, in connection with the Alabama statute and the authority of the Alabama receiver thereunder. This court, among other things, said in the case of *Kirtley v. Holmes:*

"The action being for the benefit of all the creditors, and having been instituted upon that theory in the Ohio court, which is to ascertain the amount to be assessed against stockholders, and the creditors entitled to the benefit thereof, we think it is in harmony with the usages of equity to appoint a receiver who shall, under the direction of the court, bring an action in order to bring into the fund sums arising from the liability of stockholders beyond the jurisdiction of the court. The cause of action exists in favor of all creditors. It may be impracticable to unite all in the bringing of the action. A court of equity, in the exercise of its power to appoint a receiver, may well appoint one for the purpose of reaching such outstanding
liabilities. The right of such a receiver appointed in another
313 jurisdiction to maintain an action has been recognized in many well-considered cases. *A receiver's right to sue is recognized upon principles of comity, where no injustice would be done to the citizens of the local jurisdiction, or his recognition conflict with public policy.*" [Italics ours.]

Can it be said in the Sterrett case that we ask injustice to be done, or that there is conflict with public policy?

Confidently we answer in the negative, for here we have a suit which has been pending since May 11th, 1912, and in which the complainant has been diligent at every point.

After the case was first submitted it was held on submission by the learned Judge below during a period of about eight months, when a decision was rendered for complainant. Then upon application of the defendant a rehearing was granted. Additional voluminous testimony was taken. The case was re-argued orally and extensive briefs filed, and then after another submission, the same judge on May 1, 1916, entered a decree on behalf of the plaintiff, and from which appeals were taken.

During all of this time, the defendant was represented by distinguished counsel, among them two former Judges of the Superior Court of Cincinnati, one of whom had been a highly honored U. S. Senator.

Motions to dismiss for want of equity; for defect of parties, etc., had been interposed, but at no time was the question as to the right of the receiver to sue raised until in oral argument in this court.

After all the cases are read and the underlying principles correctly deduced therefrom, the law upon the point is clear, viz.:

314 Where the legislative branch, as distinct from the judicial department, of government, vests in a receiver the power to collect debts, sell all property, and distribute the proceeds of a trust fund, consisting of the assets of an insolvent corporation, he has title, or is *quasi*-assignee, notwithstanding the restriction placed upon him by the statute, of acting in the administration of the trust under the direction of a court; and has authority, when directed by the court of administration, to invoke the aid of all other courts to assist him in performing the duties imposed, and exercising the rights conferred upon him by the Legislature.

Respectfully submitted,

EDMUND H. DRYER AND
PHILIP ROETTINGER,
Attorneys for Appellant (Plaintiff Below).

315 *Motion for Stay of Mandate.*

(Filed Jan. 7, 1918.)

Now comes the complainant, Sterrett, Receiver and moves the Court in case the Court overrules Complainant's petition for a rehearing that a stay of the mandate be granted for the statutory period pending an application to the Supreme Court of the United States by petition for writ of certiorari herein, as in such cases made and provided.

E. H. DRYER &
PHILIP ROETTINGER,
Attorneys for Sterrett, Receiver.

Copy of the above motion has been received and the four days' notice provided by rule 24 is hereby waived.

CHAS. M. LESLIE.

Order Denying Petition for Rehearing.

(Filed Jan. 8, 1918.)

The petition for rehearing filed in these causes is hereby denied.

316 *Order Withholding Mandate.*

(Filed Jan. 9, 1918.)

It is hereby ordered that the mandates in the above entitled causes be withheld for the statutory period allowed for the filing of application for writ of certiorari and in the event of such application

being seasonably made, the mandates will be further withheld until the Supreme Court disposes of the matter.

317 *Motion to Certify.*

(Filed Jan. 24, 1918.)

Now comes W. C. Sterrett, Receiver, plaintiff herein and moves the Honorable Judges of this Court upon the authority of Metropolitan Water Co. v. Kaw Valley Drainage District, 223 U. S., 519, to certify to the Honorable Judges of the Supreme Court of the United States the question of jurisdiction raised by counsel for Second National Bank upon oral argument of the appeal in this Court, upon consideration of which this Honorable Court has held that the bill of plaintiff is not maintainable in the District Court of the United States for the Southern District of Ohio, Western Division, and has ordered the same to be dismissed.

E. H. DRYER,
PHILIP ROETTINGER,
Att'ys for Sterrett, Receiver.

STATE OF OHIO,
County of Hamilton, ss:

The undersigned being duly sworn, says that on the 23rd day of January, 1918, he served copies of the foregoing motion upon Messrs. Leslie, Jelke, Sagmeister and Maxwell by leaving said copies at their offices respectively.

H. F. KOENIG, Jr.

Sworn to before me and subscribed in my presence this 23rd day of January, 1918.

[SEAL.]

S. C. ROETTINGER,
Notary Public, Hamilton County, Ohio.

318 *Order Denying Motion to Certify.*

(Filed Feb. 16, 1918.)

Ordered, that the motion, filed herein after decision rendered and rehearing denied, that this court certify to the Supreme Court "the question of jurisdiction raised by counsel for Second National Bank upon oral argument of the appeal in this court," is denied.

319 United States Circuit Court of Appeals for the Sixth Circuit.

I, William C. Cochran, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of W. C. Sterrett, Receiver, etc., vs. Second National Bank, etc., and Second National Bank, etc., vs. W. C. Sterrett, Receiver, etc., No

2998 & 3001, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 18th day of February, A. D. 1918.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

WILLIAM C. COCHRAN,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

320 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

Being informed that there is now pending before you a suit in which W. C. Sterrett, as Receiver of the Alabama Trust & Savings Company, is appellant, and The Second National Bank of Cincinnati is appellee, No. 2998, and The Second National Bank of Cincinnati is appellant, and W. C. Sterrett, as Receiver of The Alabama Trust & Savings Company, is appellee, No. 3001, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal and cross-appeal from the District Court of the United States for the Southern District of Ohio, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you
321 that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the third day of April, in the year of our Lord one thousand nine hundred and eighteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

United States Circuit Court of Appeals for the Sixth Circuit, *ss:*

I, William C. Cochran, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the transcript of the record of the proceedings of this court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this court.

In pursuance of the command of the foregoing writ of certiorari I now hereby certify that on the 16th day of April, A. D. 1918, there

was filed in my office a stipulation in the above entitled case in the following words, to-wit:

United States Circuit Court of Appeals for the Sixth Circuit.

Nos. 2998 and 3001.

W. C. STERRETT, as Receiver of The Alabama Trust & Savings Company, Appellant,

vs.

SECOND NATIONAL BANK OF CINCINNATI, OHIO, Appellee.

Stipulation.

It is hereby stipulated that the transcript already filed in the Clerk's office of the Supreme Court of the United States with the petition for the writ of certiorari be taken as a return to said writ dated the 3rd day of April, 1918.

E. H. DRYER AND
PHILIP & S. C. ROETTINGER,
Att'ys for Sterrett, Rec.
LAWRENCE MAXWELL,
CHARLES M. LESLIE,
J. SAGMEISTER,
FERDINAND JELKE, JR.

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof.

Witness my official signature and the seal of said court at Cincinnati, Ohio, in said Circuit, this 16th day of April, A. D. 1918, and in the 142nd year of the Independence of the United States of America.

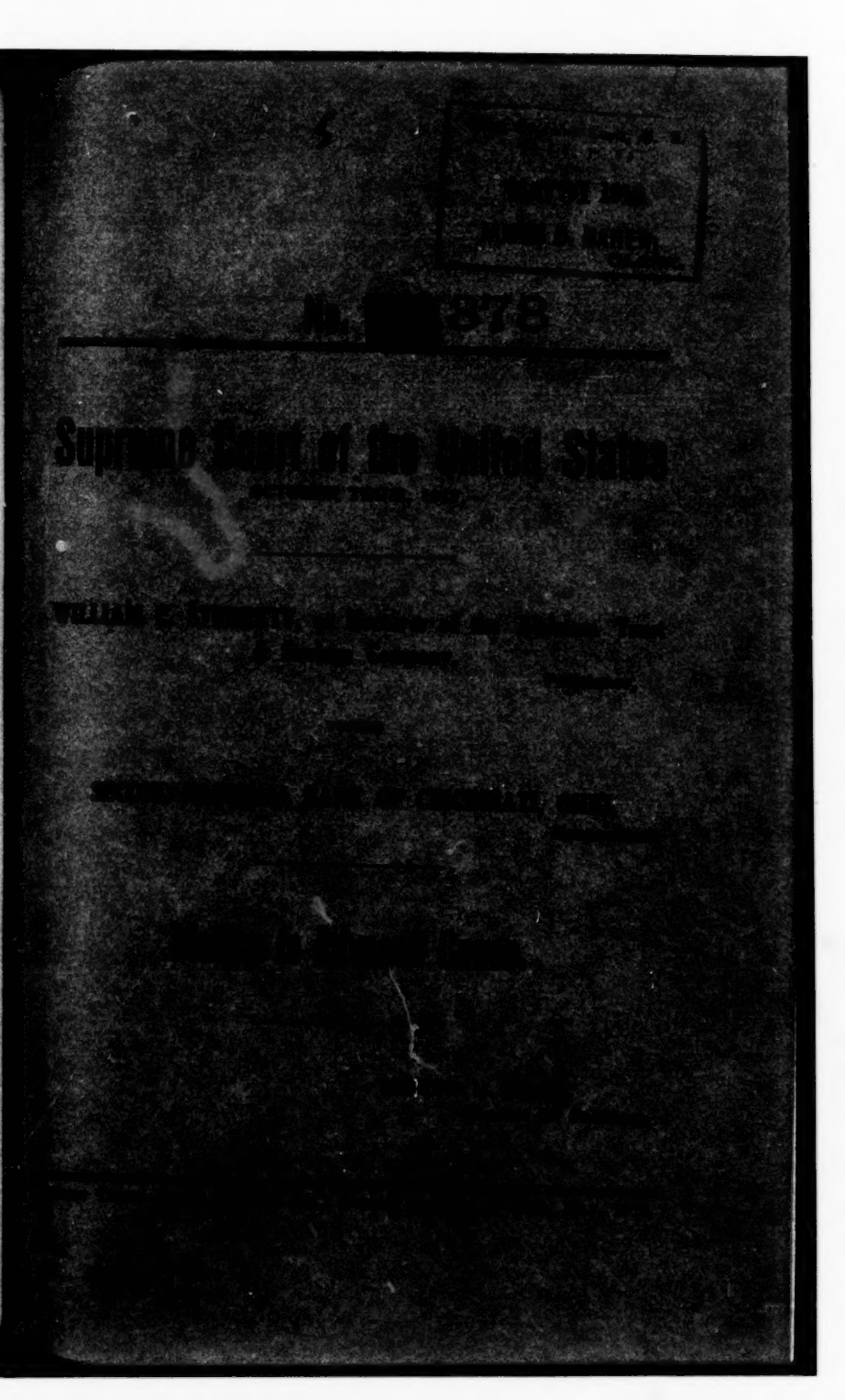
[Seal United States Circuit Court of Appeals, Sixth Circuit.]

WILLIAM C. COCHRAN,
Clerk United States Circuit Court of Appeals for the Sixth Circuit.

Filed Apr. 16, 1918. Wm. C. Cochran, Clerk.

322 [Endorsed:] File No. 26,368. Supreme Court of the United States, No. 901, October Term, 1917. W. C. Sterrett, as Receiver, etc., vs. Second National Bank of Cincinnati, Ohio. Writ of Certiorari.

323 [Endorsed:] File No. 26,368. Supreme Court U. S. October term, 1918. Term No. 378. W. C. Sterrett, as Receiver, etc., Petitioner, vs. Second National Bank of Cincinnati, O. Writ of certiorari and return. Filed April 19, 1918.



Supreme Court of the United States.

October Term, 1917.

WILLIAM C. STERRETT, as Receiver of the Alabama Trust & Savings Company,

Petitioner,

No. 901. *versus*

SECOND NATIONAL BANK OF CINCINNATI, OHIO,

Respondent.

Motion to Advance Cause.

Comes the Petitioner and showeth unto the court:

1. That a writ of *certiorari* to the United States Circuit Court of Appeals for the Sixth Circuit has been, by this court in this cause, awarded, issued and agreement of parties in lieu of return made and filed herein.

2. This is a suit in equity involving, with interest, approximately $200,000.00, instituted by petitioner against respondent in the District Court of the United States for the Southern District of Ohio, Western Division, May 11, 1912. From final decree of that court on the merits in favor of this petitioner for $25,557.31, both sides appealed to said Circuit Court of Appeals, which, December 4, 1917, held that said District Court was without jurisdiction to render the decree in favor of the petitioner, and rendered a decree reversing said decree of the lower

court and remanding the cause with directions to said District Court to take further proceedings accordingly. Mandate from said Circuit Court of Appeals is stayed until this proceeding here is disposed of.

Wherefore, petitioner prays that such order be made and such final hearing be advanced to a near day to be set and fixed by the court.

EDMUND H. DRYER,
Counsel for Petitioner.

It is agreed between the parties that the foregoing motion to advance may, without notice, be filed and submitted to, and granted by, the court, at any time.

This May 29, 1918.

EDMUND H. DRYER,
Counsel for Petitioner, William C. Sterrett, as Receiver, etc.

LAWRENCE MAXWELL,
Counsel for Respondent, the Second National Bank of Cincinnati, Ohio.

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Supreme Court of the United States.

OCTOBER TERM, 1917

W. C. STERRETT, as Receiver of The Alabama Trust & Savings Company,

Petitioner,

vs.

SECOND NATIONAL BANK OF CINCINNATI, O.,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

To the Honorable the Supreme Court of the United States:

The petition of W. C. Sterrett, as receiver of Alabama Trust & Savings Company (hereinafter called Savings Company), respectfully shows and represents to the court as follows:

1. Under and according to the provisions of Sections 3509, 3512 and 3511 of the Code of Alabama of 1907 (Volume 2, pp. 430, 433), the material parts of which provide as follows:

> "3509. * * * The assets of insolvent corporations constitute a trust fund for the payment of the creditors of such corporations, which may

be marshalled and administered in courts of equity in this state."

"3512. * * * The court * * * may appoint a receiver of all the property and assets of the corporation * * * (who) under the direction of the court, must exercise the same powers and perform the same duties as are required of receivers in the next preceding section, and otherwise manage the affairs of the corporation pending final settlement thereof as the court shall direct. * * *"

"3511. * * * Shall appoint a receiver of all the books, property and assets of the corporation * * * (who) shall, under the direction of the court, collect all debts due the corporation, and sell all the property, real and personal, of the corporation, pay the debts thereof ratably or in full as the funds realized may admit, and divide the residue after the debts and costs are paid, ratably among the several classes of stockholders, according to the amount owned by each and according to the preferences, if any, of the several classes as provided in the certificates of incorporation,"

Kate Rowland and other creditors of the Savings Company, a then insolvent banking corporation, organized and existing under the laws of the state of Alabama, on July 21, 1910, filed a bill of complaint against that bank in the Chancery Court of Jefferson County, Alabama, a court of general equity jurisdiction of that state, and so prosecuted the same as that the said court on April 27, 1911, rendered a final administration decree, adjudicating and ordering as follows:

"* * * that defendant (the Savings Company) is insolvent; that its assets constitute a trust fund for the payment of its creditors, and should be marshalled and administered in this

court; that defendant is a corporation organized under the General Laws of Alabama; that defendant corporation upon a final settlement should be dissolved, and that a receiver should now be appointed to administer its estate; that said defendant has suspended business and is not about to resume the same, and can not resume the same with safety to the public; that W. C. Sterrett be, and he is hereby, appointed receiver of defendant, and empowered and directed to demand and take into his possession all of defendant's assets and property to which it is entitled and to recover the same, to be reduced to money and administered under the further order of this court, and, to that end, that the said receiver may employ counsel and may bring such actions at law or in equity as he may be advised and incur such expense as may be necessary as an incident thereto."

Later, on March 8, 1912, the said court specifically directed the said receiver to bring this suit in the District Court of the United States for the Southern District of Ohio, Western Division.

2. Accordingly, on May 11, 1912, he brought this suit in the United States District Court for the Southern District of Ohio against the Second National Bank of Cincinnati, Ohio (hereinafter called defendant), appropriately setting forth diverse citizenship and alleging and proving, in substance, that defendant, on or about May 1, 1909, induced the managing officers and agents of said Savings Company to give defendant its notes for $84,200 for their individual debts to defendant, and as collateral security therefor induced them to give over to defendant property of the Savings Company consisting of notes and other claims of the value of $72,557.19, and that

under color of such spurious notes of the Savings Company, defendant retained $17,200 of deposit account and other securities of the Savings Company aggregating near $100,000. The bill asked for cancellation of the spurious notes, discovery of these collateral securities, an accounting and decree against defendant for all moneys collected by it therefrom, for the value of all it disposed of, and for a return in specie of all it still held. Upon final hearing, the District Court rendered a decree in favor of plaintiff and against defendant for only $25,557.31. Both sides took appeals to the Circuit Court of Appeals for the Sixth Circuit, which were submitted together on October 8, 1917. When the oral argument was made on that day, defendant through its counsel for the first time made the point, and cited in support *Great Western Mining Co.* v. *Harris,* 198 U. S., 561, that the District Court was without jurisdiction and the decree should be reversed with directions to dismiss for want of jurisdiction. The Circuit Court of Appeals, on December 4, 1917, filed an opinion holding, on authority of *Great Western Mining Co.* v. *Harris, supra,* that the District Court was without power to render decree in favor of plaintiff and on the same day rendered a decree reversing the decree of the District Court and remanded the cause with directions to that court to take further proceedings in accordance with that opinion. December 26, 1917, plaintiff filed petition for rehearing, which was denied January 8, 1918. On the 24th of January, 1918, plaintiff filed a motion asking that the Circuit Court of Appeals, on the authority of *Metropolitan Water Co.* v. *Kaw Valley Drainage District,* 223 U. S., 519, certify to this court the question of jurisdiction of the District Court, which was on the 16th day of February, 1918, de-

nied. Mandate is stayed until this petition is disposed of.

Petitioner files and presents as an exhibit hereto a certified copy of the entire transcript of record of the case, including the proceedings in the Circuit Court of Appeals.

The Circuit Court of Appeals was in error in deciding that the District Court was without power to render a decree in favor of petitioner and directing it to proceed accordingly, and a writ of certiorari should be issued to correct the error and an order here made that its said decree be set aside, with instructions that it proceed to hear the appeal of petitioner and dispose of the same on its merits, because

(a) The District Court has jurisdiction which it is forbidden to exercise; and, unless the writ is awarded, petitioner will be denied the privilege of resort to a Federal court.

(b) The question is of gravity and far-reaching importance in this: The sum involved is large, amounting approximately to $200,000 and the decision, if allowed to stand, will result in a perpetual denial to all such Alabama receivers of the right of resort to any of the Federal courts within the area of the Sixth Circuit.

(c) The opinion of the Circuit Court of Appeals is in conflict with those of this court in the cases of *Bernheimer* v. *Converse*, 206 U. S., 516, and *Converse* v. *Hamilton*, 224 U. S., 243, and of the Fifth Circuit Court of Appeals in the case of *Goss* v. *Carter*, 156 Fed., 746, at pages 750-51 upon a point involving the exercise of judicial power by Federal courts; and the writ should be granted to insure harmony and preserve in its full integrity the exercise of such jurisdiction.

(d) Upon his appointment as receiver by the state court, petitioner, under the terms of said state statutes, is invested with title to, or is *quasi*-assignee of, the assets of said Savings Company involved in this suit; and the court of his appointment had the rightful authority to order him to bring this suit in the performance of the duties, and in the exercise of the powers, conferred on him by said statutes; and the opinion and decision of the Circuit Court of Appeals is, in effect, a direction to the lower court to refuse to give full faith and credit to the decree of the state court in making the appointment and in directing him to perform his statutory duty of collecting and distributing these assets.

(e) The Circuit Court of Appeals should have followed *Hundley* v. *Hewitt*, 195 Ala., 647, and *Oates* v. *Smith*, 176 Ala., 39, and passed upon the merits of the appeal.

Following this petition is brief in support thereof.

Your petitioner prays that a writ of certiorari be issued out of and under the seal of this court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding said court to certify and to send to this court on a day certain to be therein designated a full and complete transcript of the record and of all of the proceedings of said Circuit Court of Appeals in this case, which was entitled in that court, to the end that said cause may be reviewed and determined by this court, as provided by law, and that it be directed to set aside and hold for naught its said opinion and decree, and that it proceed to hear and dispose of the said cause upon the merits of the said appeal, and that your petitioner may have such other and further relief and remedy in the premises as to this court may seem appropriate, and

that the said judgment of the Circuit Court of Appeals may be reversed by this Honorable Court.

Edmund N. Dryer

FORNEY JOHNSTON,
Counsel for Petitioner.

STATE OF ALABAMA, JEFFERSON COUNTY:

Forney Johnston, being duly sworn, says that he is counsel for the petitioner and that the allegations of the foregoing petition are true.

FORNEY JOHNSTON.

Sworn to and subscribed before me, this 25th day of February, 1918.

[SEAL]

D. E. LOVE,
Notary Public.

My commission expires the 5th day of December, 1920.

TO MESSRS. JELKE, MAXWELL, LESLIE AND SAGMEISTER,
Counsel for said Second National Bank of Cincinnati, Ohio:

Take notice that the foregoing petition will be submitted to the Supreme Court of the United States for a writ of certiorari as therein prayed for, at the opening of the court on Monday, the 25th day of March, 1918.

FORNEY JOHNSTON,
Counsel for Petitioner.

Service of notice of the said date of submission of the foregoing petition and a copy of the said petition together with a copy of the brief following in support thereof, is accepted on this, the 27th day of February, 1918.

FERDINAND JELKE, JR.,
Per L. C. Walber,
LAWRENCE MAXWELL—M. H.,
CHAS. M. LESLIE,
J. SAGMEISTER,
Counsel for Respondent, The Second National Bank of Cincinnati, Ohio.

2-27-1918.

BRIEF IN SUPPORT OF FOREGOING PETITION.

The foregoing petition contains a summary and statement of the matter involved and the reasons relied on for the allowance of the writ. They need not be repeated.

BRIEF OF THE ARGUMENT.

In cases where chancery receivers of state courts derive their authority solely from the court of their appointment, Federal courts in another state are without power to entertain suits in their behalf by comity, and will dismiss such suits for the want of jurisdiction. *Great Western Mining Co.* v. *Harris*, 198 U. S., 561.

But, where he is by statute authorized to "collect all debts due the corporation, and sell all the property, real and personal, of the corporation, pay the debts thereof ratably or in full as the funds realized may admit, and divide the residue after the debts and costs are paid, ratably among the several classes of stockholders,"

though done under the direction of the court of administration, he has title or is *quasi*-assignee, and can not be denied access to the Federal courts in other states in the performance of his statutory duty of collecting the assets. *Bernheimer* v. *Converse*, 206 U. S., 516; *Converse* v. *Hamilton*, 224 U. S., 243, 244, *Goss* v. *Carter*, 156 Fed. (5 C. C. A.), 746; *Howarth* v. *Lombard*, 175 Mass., 570; *Howarth* v. *Angle*, 162 N. Y., 179; *Oates* v. *Smith*, 176 Ala., 39; *Hundley* v. *Hewitt*, 195 Ala., 647.

On authority of *Great Western Mining & Manufacturing Co., supra*, the Circuit Court of Appeals decided "that the District Court was without power to render the decree in his (plaintiff's) favor," reversed it, and remanded the cause, "with directions to take further proceedings in accordance with the opinion of this court." This made the opinion a part of the decree as though set out at length. *Metropolitan Water Co.* v. *Kaw, etc.*, 223 U. S., 519.

An appeal will not lie from a decree of the district court dismissing for want of jurisdiction in obedience to mandate on this decree. The Circuit Court of Appeals having refused to certify the question, certiorari lies; the remedial processes of the statute of 1891 affording ample opportunity for a review here of every judgment or decree of a lower court which the statute contemplates should be reviewed and revised by this court. *Brown* v. *Alton Water Co.*, 222 U. S., 325; *Metropolitan Water Co.* v. *Kaw*, 223 U. S., 519, *supra; Shapiro* v. *U. S.*, 235 U. S., 412; *Kingman* v. *Western Mfg. Co.*, 170 U. S., 675. Though, in such cases, this court will go no farther than to set aside the decree of the upper court and direct that it proceed on the merits of the appeal. *Brown* v. *Fletcher*, 237 U. S., 583; *Cramp* v. *Curtis*, 228 U. S., 645; *Lutcher* v. *Knight*, 217 U .S., 257.

The suit in itself is important, the amount involved being approximately $200,000. The decision, if allowed to stand, denies efficacy to the laws of a state and bars all receivers of the trust estates of insolvent corporations of that state from access to all Federal courts in that portion of the United States embraced in the area of the Sixth Circuit. The question, therefore, is of such gravity and of far-reaching importance, the writ, as the only remedy, should be awarded. *Central Trust Co.* v. *Chicago Auditorium Association*, 240 U. S., 581; *Re Lau Ow Bew*, 141 U. S., 583; *U. S.* v. *The Three Friends*, 166 U. S., 1.

Where the opinion of a Circuit Court of Appeals conflicts with those of this court, or of the Supreme Court of a state, it is necessary for this court to award the writ in order to make potent the principles of law announced by this court; and where different circuits differ, the writ will be awarded to insure harmony and uniformity. *Forsyth* v. *Hammond*, 166 U. S., 506.

Where a receiver derives his right to collect and distribute a trust fund under a statute, and is appointed by a state court and ordered to proceed in another state to make collection, a refusal of the courts of the latter state to entertain his suit for that purpose is a denial of that full faith and credit to which the laws and judicial proceedings of the former are entitled under the Constitution and laws of the United States. *Converse* v. *Hamilton*, 224 U. S., 243.

There being no right of appeal, the writ will be awarded when the construction of a state statute by the supreme court of that state is not followed by a Circuit Court of Appeals on the same point. *Northern Pacific Railway Co.* v. *Meese*, 239 U. S., 614.

The courts of the United States are bound to give to the judgments of the state courts the same faith and credit that the courts of one state are bound to give to the judgment of the courts of her sister states. *Cooper v. Newell,* 173 U. S., 567.

ARGUMENT.

The receiver, being authorized by the Alabama statute, to proceed, under the direction of the court, "to collect *all* debts due the corporation, and sell *all* the property, real and personal, of the corporation, pay the debts thereof ratably or in full as the funds realized may admit, and divide the residue after the debts and costs are paid, among the several classes of stockholders, according to the amount owned by each, and according to the preferences, if any, of the several classes as provided in the certificates of incorporation," is the person designated by the law to take the property of the insolvent corporation, and hold and dispose of it in trust for the use and benefit of creditors, and other parties interested. The law, which clothed him with this trust, is, in legal effect, part of the charter of the corporation. He is the trustee of an express trust, with all the rights which properly belong to such a position. Though he was selected by the court for the administration of the trust estate, his authority to collect, liquidate, and distribute, does not come from the decree of the court, but from the statute. He is, in fact, the corporation itself for all the purposes of winding up its affairs. *Relfe* v. *Rundle,* 103 U. S., page 225.

Now, in the absence of any Alabama decisions on the question, it may safely be assumed, under the state and

Federal decisions cited above, to which may be added *Kirtley* v. *Holmes*, 107 Fed. (6 C. C. A.), 1, at p. 7 (2), that no court would hesitate to decide that an Alabama receiver, deriving his authority to collect, reduce to money, and distribute all the assets and property of an insolvent corporation from the statute, holds title, or is a *quasi*-assignee of such trust fund.

The next question for consideration is whether or not the decisions of the Supreme Court of Alabama have destroyed the prevailing rule. We shall first discuss the three cases referred to in the opinion of the court below, taking them *seriatim*.

The case of *Montgomery B. & T. Co.* v. *Walker*, 181 Ala., 368, was where the Superintendent of Banks, under the authority conferred upon him by the Alabama statute and without previous resort to the court, brought suit to recover assets of the insolvent bank. His right to institute such suit was held to be authorized by reason of the fact that the statute under such circumstances authorized him to collect all debts due and claims belonging to the bank and to do such acts as were necessary to conserve its assets and business. That case followed the Supreme Court of the United States concerning the duties of a receiver of a national banking association, who was held to be, in substance, a statutory assignee, with power to sue in his own name to recover assets. It is precisely this for which we contend in this case. True it is in the opinion said that the proceedings did not operate to change the ownership or legal title to the property; but the court did there expressly hold that the superintendent is in reality a receiver and, in effect, a *statutory assignee* for the purpose of taking charge of the bank for the benefit of its stockholders, depositors,

and other creditors, by reason of the authority given him to collect its assets and to do such acts as were necessary to conserve its assets and business. The statute, under which the plaintiff in this case derives his authority, is quite as broad and as comprehensive; though, before proceeding to assert the rights given him by the statute, it is necessary for him to obtain leave of the court, as it was necessary for such receiver to obtain leave of the courts under the Washington and Minnesota statutes. While this case holds that there is no change of ownership or legal title to the property, it does not hold that the Superintendent of Banks is not *quasi*-assignee. On the contrary, it holds him to be a statutory assignee with authority to sue, by reason of the fact that he is given by the statute authority to collect and distribute.

The case of *Cobbs, Receiver*, v. *Vizard Investment Company*, 182 Ala., 732, was a case where a creditor filed his petition for the allowance of his claim in the court in which the trust fund was administered. The court of administration held the claim good, and the receiver, without direction of the court, took an appeal to the Supreme Court. The only question involved for decision was whether or not the receiver could take such appeal without first obtaining leave. It is clear that under the Alabama statutes, quoted *supra*, he had no right to take such an appeal without first obtaining leave or direction of the court, notwithstanding the allowance of the claim might affect the amounts which might ultimately be paid to the creditors. The question there turned upon the point of whether or not the court of administration in authorizing the receiver to contest in that court the allow-

ance of claims had given permission to appeal from its orders of allowance of claims. The Supreme Court said:

> "In the general expression of this decree there is nothing to indicate that it was written with the view of conferring unusual authority upon the receiver, or that the court had in contemplation the propriety of the receiver's appeal from its future orders."

The authority of the receiver to collect assets was not involved in that case, directly or indirectly, and in taking the appeal without the direction of the court, he was proceeding contrary to the statute under which he derived his authority.

The third of the cases cited by the Court of Appeals is that of *Coffey* v. *Gay*, 191 Ala., 137, which was a case where the receiver sued by independent suit in the court of administration, but took an appeal without obtaining the leave or direction of the court. Naturally, that case was disposed of upon the authority of *Cobbs, Receiver,* v. *Vizard Investment Company, supra,* and the disposition was proper, for the simple and obvious reason that before he could take such an appeal he must have had the leave or direction of the court of his appointment, under the Alabama statute; the court saying:

> "While it is true the suit is by separate and independent bill, yet it may still be considered as merely a part of the administration of the trust estate and as ancillary to the main suit."

It thus appears that when these three Alabama cases are considered, in connection with the Alabama statutes and the subject matter under consideration of the court for disposition, there is no conflict between them and the

Supreme Courts of the United States, Massachusetts, and New York, and the Circuit Courts of Appeals of the Fifth and Sixth Circuits; but the position of the Supreme Court of Alabama is made clear and conclusive when we read the case of *Oates* v. *Smith*, 176 Ala., 39, which preceded, and the case of *Hundley* v. *Hewitt*, 195 Ala., 647, which came after these three cases.

In the case of *Oates* v. *Smith*, 176 Ala., 39, Smith was the receiver of an Alabama insolvent bank, acting under the same statutes, and whose administration was pending in the same court, as that of the plaintiff in this case. It is not desired to claim more for this decision than may be reasonably gathered from it. On page 46 of the opinion occurs this language:

> "The trust fund theory of the statute, as well as the equitable rights of the receiver, just as effectually hold and protect the assets of the bank for the purposes in view as if the legal title were vested in the receiver. In a similar case, however, the Supreme Court of Massachusetts, has held that such a receiver 'is to be regarded as a *quasi*-assignee, and as being vested with the legal title to the assets of the bank.' *Howarth* v. *Lombard*, 175 Mass., 570, 579, 56 N. W., 888, 49 L. R. A., 301. And this ruling seems to meet with the approval of Mr. High. High on Receivers (4th Ed.) 317*c*."

It will be noticed that the court expressly holds that the *equitable rights* of the receiver (under the statute) just as effectually hold and protect the assets of the bank fo rthe purposes in view as if the *legal title* were vested in him. It is also to be noticed that the court cites with approval as "a similar case" *Howarth* v. *Lombard*, 175 Mass., 570, 579, *supra*, which is the same case upon which

this court relies in the cases of *Bernheimer* v. *Converse*, 206 U. S., p. 534, and *Converse* v. *Hamilton*, 224 U. S., p. 260. This case alone is sufficient to show the view of the Supreme Court of Alabama, when the precise question is under its consideration.

The case of *Hundley* v. *Hewitt*, 195 Ala., 647, was where a receiver of an insolvent insurance company, such as the plaintiff in this case, and appointed by the same state court, after first being authorized and directed so to do, instituted suit to collect an undischarged stock liability as a part of the assets and property of the corporation.

The appointment was made under Section 4552 of the Code of Alabama 1907, the material portion of which reads as follows:

> "Such courts * * * may appoint agents or receivers to take possession of the property and effects of the company, and to settle its affairs, subject to such rules and orders as the court may, from time to time, prescribe, according to the course of proceedings in equity."

This language is not broader in legislative grant, nor gives the court less directory power, than the provisions of Sections 3511 and 3512, quoted *supra*.

In disposing of the question of whether or not such a receiver, upon first receiving the directions of the court so to do, had the right by virtue of the statute to institute and prosecute the suit, he court said:

> "In the case of *Montgomery Bank & Trust Co.* v. *Walker*, 181 Ala., 368, 61 South., 951, the first assignment of demurrer to the bill challenged the right and authority of the superintendent of banks to maintain the bill in that case. There was no express authority in the

statute, under which the superintendent of banks was proceeding, for him to maintain a suit of the character there involved, yet he was authorized to collect all debts and claims belonging to the bank and 'to do such acts as are necessary to conserve its assets and business.' This court in that case found no difficulty in holding that the superintendent of banks had authority to maintain suit. So here, a receiver is appointed by a court having full jurisdiction, and in conformity with the statute, which directs the court to make all orders and decrees needful in the premises and appoint receivers to take possession of the property and to settle its affairs under the orders of said court.

"The statute clearly looks to a final settlement of the affairs of the corporation, and certainly its affairs could not be settled until its debts are collected. In *Cartwright* v. *West*, 173 Ala., 202, 55 South., 918, this court, speaking of the rights and duties of a trustee in bankruptcy, said: 'The trustee in bankruptcy in a sense is a representative both of the bankrupt and the creditors. As such he succeeds in right and title to the bankrupt's estate for the benefit of his creditors. He may, as a general rule, maintain all actions, both at law and in equity, for the recovery and preservation of the assets, both real and personal, of the bankrupt's estate that the bankrupt himself, but for the bankruptcy could have maintained. Even more, he may maintain an action the bankrupt could not, where, as in the present case, he seeks to avoid the conveyances made by the bankrupt in fraud of his creditors. In this latter instance it can not be said that the trustee is a representative of the bankrupt, for he (the bankrupt) could not maintain such a bill, nor in any legal or equitable proceeding become a beneficiary of his own fraudulent act.'

> "We are of the opinion that the receiver appointed in this case, acting under orders of the court appointing him—a court of competent jurisdiction, with full power to settle the affairs of a dissolved corporation—has rights and duties of a kindred character to those of a trustee in bankruptcy so far as the question here concerned is involved, and that the above-quoted language is applicable to the receiver in this cause. We are therefore clearly of the opinion that the suit is properly brought by this receiver."

The question there involved and decided was the identical question under consideration here; and the Supreme Court of Alabama unequivocally decides that such receiver as this holds legal title to the property or that he is *quasi*-assignee, having the same authority to institute suits to collect assets, after obtaining leave of court, as a trustee in bankruptcy or a National bank receiver has; for it uses in support of the conclusion the case of *Montgomery Bank & Trust Company* v. *Walker*, 181 Ala., 368, which in turn holds that, because the statute gives the Superintendent of Banks the authority to collect debts and claims and to do such acts as are necessary to conserve its assets and business, after he shall have taken charge under the statute, he is just as much a statutory assignee for such purposes as a receiver of a National banking association.

As already shown herein, Section 3511 of the Code of Alabama of 1907, Volume 2, provides not only that the receiver shall "collect all the debts," but shall "sell all of the property, real and personal, of the corporation," and shall "divide the residue * * * ratably among the several classes of stockholders." The chancery court

appointing Sterrett as receiver decreed (Rec., p. 37) "that defendant corporation upon final settlement should be dissolved," and later in due course of administration (Rec., p. 213) that, after the creditors were paid, the balance was to be divided and distributed to the stockholders whose claims were filed in the administration proceedings. We therefore have before us a statute which vests in the receiver all the power, authority, or title which the corporation had, to-wit, the power to collect all of its debts, sell all of its property, real and personal, and, after paying its debts, to make a division of the residue among the stockholders. Such statutory authority could be exercised only by one holding legal title or one who by law occupied the situation of *quasi*-assignee.

The Sixth Circuit, in the case of *Kirtley* v. *Holmes*, 107 Fed., 1, in an opinion delivered by Mr. Justice Day, then Circuit Judge, is thoroughly committed to this position. There the statute did not in terms authorize the appointment of a receiver, and of course did not use the comprehensive language of the Alabama statute, investing in him the legal title or making him a statutory assignee; but it was clear that, in order to make the statute completely effective, the court in administering the statute must or ought to appoint a receiver, in order to effect the collection designed by the statute. The court, therefore, looked to the substance rather than to the form of the matter, and held that such a receiver could sue in a foreign jurisdiction; and, in support of its conclusion, cites the case of *Howarth* v. *Angle*, 162 N. Y., 179, and *Howarth* v. *Lombard*, 175 Mass., 570; the latter of which cases is the one which the Supreme Court of Alabama cites with approval in the case of *Oates* v.

Smith, 176 Ala., 39, in connection with the Alabama statute and the authority of the Alabama receiver thereunder. The court, among other things, said in the case of *Kirtley* v. *Holmes*:

> "The action being for the benefit of all the creditors, and having been instituted upon that theory in the Ohio court, which is to ascertain the amount to be assessed against stockholders, and the creditors entitled to the benefit thereof, we think it is in harmony with the usages of equity to appoint a receiver who shall, under the direction of the court, bring an action in order to bring into the fund sums arising from the liability of stockholders beyond the jurisdiction of the court. The cause of action exists in favor of all creditors. It may be impracticable to unite all in the bringing of the action. A court of equity, in the exercise of its power to appoint a receiver, may well appoint one for the purpose of reaching such outstanding liabilities. The right of such a receiver appointed in another jurisdiction to maintain an action has been recognized in many well-considered cases. *A receiver's right to sue is recognized upon principles of comity, where no injustice would be done to the citizens of the local jurisdiction, or his recognition conflict with public policy.*" (Italics ours.)

After all the cases are read and the underlying principles correctly deduced therefrom, the law upon the point is clear, viz.:

Where the legislative branch, as distinct from the judicial department, of government, vests in a receiver the power to collect debts, sell all property, and distribute the proceeds of a trust fund, consisting of the assets of

an insolvent corporation, he has title, or is *quasi*-assignee, notwithstanding the regulation placed upon him by the statute, of acting in the administration of the trust under the direction of a court; and has authority, when directed by the court of administration, to invoke the aid of all other courts to assist him in performing the duties imposed, and exercising the rights conferred upon him by the Legislature.

Respectfully submitted,

FORNEY JOHNSTON,
Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1918.

W. C. STERRETT, as Receiver of Alabama Trust & Savings Company,

Petitioner,

No. 378. VERSUS

SECOND NATIONAL BANK OF CINCINNATI, OHIO,

Respondent.

Reply Brief for Petitioner.

THE DEFENSE.

Defense of Respondent, as disclosed by brief, rests upon three points, which will be answered in the order given:

1. That (p. 16) Section 3509 of Chapter 69 of the Code of Alabama of 1907 vested no title, and (quoting from *City Bank & Trust Company* v. *Leonard*, 168 Alabama, 404), "was only intended to settle what had theretofore been a disputed question as to the common law of this state upon that subject."

2. That (pp. 6-8) Section 3560 is exclusive of Sections 3511 and 3512 of the same chapter.

3. That (pp. 8-12) under Section 3560 superior jurisdiction over the subject-matter was acquired and exercised in a suit brought at a later time by the attorney general to administer the assets of another bank.

REPLY.

I.

Section 3509, in terms, impresses the assets of an insolvent corporation with the character of a trust fund for creditors. The contingency of insolvency arising, they thereby became beneficiaries of an express trust. The case of *City Bank & Trust Company* v. *Leonard*, *supra*, is, on this point, in the case of *Warren* v. *Kilgroe*, 176 Alabama, 479, declared not to be authoritative. The latter case was under a bill filed by one creditor for the benefit of all creditors, praying for a receiver to administer the trust under that section, and to enjoin levies under judgments obtained by the other creditors. After quoting the statute, the court said:

> "It is too evident for doubt that this bill, original and supplemental, presents a cause within the plain letter of the statute, and especially so when the jurisdiction of equity over the enforcement of trusts and the administration of trust estates is considered. * * * The discussion of this statute in *City Bank & Trust Company* v. *Leonard*, 168 Alabama, 404, is not authoritative."

II.

Sections 3509, 3511, 3512 and 3560 are of the same chapter. *Oates* v. *Smith*, 176 Alabama, page 45, holds Sections 3509 and 3560 to be parts of a single system. Obviously, the intermediate sections are also. Each has its scope of operation. Sections 3511 and 3512 provide remedies, upon complaint of beneficiaries, of a much

broader and more comprehensive nature than is given the state by Section 3560. Section 3560 provides for collecting assets and paying liabilities; Section 3512 provides for a complete liquidation and dissolution at the suit of any beneficiary of the trust estate.

III.

The bill under which final decree was rendered appointing petitioner receiver, was filed July 21, 1910 (Rec., pp. 38-39), by some creditors of the corporation, Alabama Trust & Savings Co., on behalf of all. It contained an express allegation that the defendant was insolvent and that its assets constituted a trust fund for the payment of creditors; and prayed "that the assets of defendant may be decreed to constitute a trust fund for the payment of defendant's creditors, and that the same may be marshaled and administered herein," etc. The defendant was brought into court by personal service July 23, 1910, appeared and demurred August 8, 1910 (Rec., p. 26), and final decree on the merits was rendered (Rec., p. 30), "that defendant is insolvent; that its assets constitute a trust fund for the payment of its creditors, and should be marshaled and administered in this court," etc. No other suit has been brought to administer the assets of that corporation. Later, October 5, 1910, the suit against the City (Guarantee) Bank was begun (Rec., p. 160).

Exclusive jurisdiction of all assets of the Alabama Trust & Savings Company attached, July 21, 1910. *Farmers Loan & Trust Company* v. *Lake Street E. R. R. Company*, 177 U. S., 51.

In confirming the compromise agreement in the latter case, the court was careful to decree that it should be without prejudice to "any" rights of petitioner (Rec., p. 83).

Respectfully submitted,

Edmund H. Dorr

Counsel for Petitioner.

PHILIP & S. C. ROETTINGER,
Of Counsel.

Copies of this brief have been furnished counsel for Respondent, Second National Bank of Cincinnati, Ohio. Acknowledged this October , 1918.

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Counsel for said Defendant.

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Supreme Court of the United States

OCTOBER TERM, 1918.

No. 378

W. C. STERRETT, as Receiver of the Alabama Trust & Savings Company,

Petitioner,

versus

SECOND NATIONAL BANK OF CINCINNATI, OHIO,

Respondent.

Supplemental Brief (Directed to Merits) for Petitioner.

EDMUND H. DRYER,
Counsel for Petitioner.

PHILIP & S. C. ROETTINGER,
Of Counsel.

Court Index Press, 646-650 Main Street, Cincinnati, O., September, 1918.

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Supreme Court of the United States

OCTOBER TERM, 1918.

No. 378

W. C. STERRETT, as Receiver of the Alabama Trust & Savings Company,

Petitioner,

vs.

SECOND NATIONAL BANK OF CINCINNATI, OHIO,

Respondent.

Supplemental Brief (Directed to Merits) for Petitioner.

STATEMENT OF THE CASE.

The case is here by *certiorari* to the United States Circuit Court of Appeals for the Sixth Circuit; and is advanced, on motion, because that court denied jurisdiction of the District Court and declined to dispose of the appeal on its merits.

The question of jurisdiction of the District Court is covered by brief following and supporting the petition. While, under the decisions of this court cited there (p. 9), it seems this court will go no further than to set aside the decree of the court of appeals and direct it to pro-

ceed on the merits of the appeal, adversary counsel have given notice that this court will be requested to dispose of the entire controversy on its merits, if it be found that the District Court has jurisdiction. Out of precaution, therefore, the receiver presents this supplemental brief upon the merits of the appeal. The petitioner does not object to a hearing and disposition of the case on its merits by this court, *provided* its advanced position on the docket is not lost, and the hearing is not delayed thereby.

The original bill was filed May 11, 1912 (Record, pp. 1-11), and answer thereto June 29, 1912 (Record, pp. 11-14). August 6, 1912, replication was filed (Record, p. 14). Evidence on both sides was taken and the case, on its merits, was submitted March 31, 1913, for final decree. May 28, 1914, the court filed an opinion indicating decree for plaintiff (Record, pp. 15-16). June 5, 1914 (Record, pp. 16-17), defendant moved for a dismissal of the bill; and, in the alternative, that the case be re-opened. On same day the motion to dismiss was overruled (Record, p. 17); but the case was re-opened, with leave given both sides to amend the pleadings. June 10, 1914, amended bill was filed (Record, pp. 17-41) and answer thereto was filed June 29, 1914 (Record, pp. 41-84). July 9, 1914, a motion was made by plaintiff to strike out designated portions of the answer to the amended bill (Record, pp. 84-87). To speed the trial, July 31, 1914, an agreement was filed that no replication need be filed, and that evidence might be taken without waiver of the motion to strike (Record, p. 88). February 4, 1915, a second submission for final decree was made. Opinion on final hearing was filed November 20, 1915 (Record, pp. 88-97), overruling all motions (Record, p. 97). May 1, 1916, final decree was entered for plaintiff

against defendant for $25,557.31, with interest from April 3, 1916, and full costs (Record, pp. 100-101). July 8, 1916, plaintiff prayed an appeal and assigned error of recovery (Record, pp. 102-103), as follows:

ASSIGNMENTS OF ERROR.

1. The said District Court erred in said decree to the injury of the said plaintiff.

2. The said District Court erred in said decree to the injury of the said plaintiff in that it decreed that the plaintiff recover from the defendant the sum of twenty-five thousand five hundred and fifty-seven dollars and thirty-one cents ($25,557.31), with interest from the third day of April, 1916, with the amount of costs taxed, when the said decree in favor of the plaintiff should have been for a very much larger sum.

3. The said District Court in said decree erred in that it was decreed therein that the plaintiff recover from the defendant only the sum of twenty-five thousand five hundred and fifty-seven dollars and thirty-one cents ($25,557.31), with interest thereon from the third day of April, 1916, with the amount of costs taxed; whereas the said court in said decree should have decreed that the plaintiff recover from the defendant a sum of money equal to the aggregate amount of the following sums and interest, to-wit:

Fifty thousand seven hundred and seventeen and 19/100 dollars ($50,717.19), with interest thereon from, to-wit, May 1, 1909 (being $72,557.19), less Gallilean Fishermen item of ($21,840.00);

Sixty thousand thirty-eight and 05/100 dollars ($60,038.05), with interest thereon from, to-wit, June 1, 1909;

Seventeen thousand six hundred and fifty-five and 33/100 dollars ($17,655.33), with interest thereon from, to-wit, July 1, 1909;

Thirty-six thousand eight hundred and twenty-seven and no/100 dollars ($36,827.00), with interest thereon from, to-wit, September 1, 1909; besides the cost of suit.

4. The said District Court in said decree, wherein it limited the recovery of the plaintiff from the defendant to the sum of twenty-five thousand five hundred and fifty-seven dollars and thirty-one cents ($25,557.31), with interest thereon from the third day of April, 1916, besides costs, erred in that, in order so to limit the recovery, the said District Court considered as material and relevant immaterial and irrelevant testimony, and but for such error would have entered a decree for the plaintiff for the sums specified in assignment of error 3, supra.

5. The said District Court in said decree, wherein it limited the recovery of the plaintiff from the defendant to the sum of twenty-five thousand five hundred and fifty-seven dollars and thirty-one cents $(25,557.31), with interest thereon from the third day of April, 1916, besides costs of suit, erred in that, upon the material issues and the testimony and the agreements of parties in reference thereto and in connection therewith, the said District Court should have rendered a decree in favor of the plaintiff and against the defendant for a sum of money equal to the aggregate amounts of the sums and interest particularly set forth and specified in assignment of error 3 supra, to-wit, one hundred forty-three thousand, three hundred and ninety-seven dollars and fifty-three cents ($143,397.53), with interest, as aforesaid.

6. The said District Court erred in said decree in that it did not grant the plaintiff's motion, which was filed in said cause on the 9th day of July, 1914, to strike out as

insufficient those portions of defendant's answer to the amended bill which were in said motion particularly specified.

While the total sum of $165,237.57 of recoverable principal is assigned as error (Record, p. 102, assignment 3), the bank of which plaintiff is receiver (the Alabama Trust & Savings Company, a banking corporation organized under the laws of Alabama, with its residence and place of business at Birmingham, Alabama: hereinafter, for brevity, called Savings Company) owed defendant two notes, to payment of which, according to the evidence, $27,390 and $1,775 of said $165,237.57 were applied; which may, as the court determines, reduce this total of recoverable principal to $136,072.57.

The first submission was set aside and reopened against plaintiff's objection; but it enabled the plaintiff, in the light of disclosures from the evidence then taken, to amend the bill so as to make its averments more specific. The answer set up, in attempted avoidance, much matter, which, on plaintiff's theory of the case is immaterial; and which he moved to strike out, as aforesaid; but the pleadings, in connection with the evidence, upon which the case was finally tried, consist of the amended bill, the answer thereto, plaintiff's said motion to strike out parts of the answer and the said agreement that no formal replication need be filed, and that the testimony might be taken and the case submitted without waiver of the motion to strike. This amended bill, answer and motion appear on pages 17 to 87 of the record, and it will be of no assistance to the court here to attempt to summarize them. The amended bill states plaintiff's case tersely and perspicuously; and the special prayer for relief presents plaintiff's attitude upon measure of damages and relief. The court is requested to read it on pages

17-41 (giving attention to kind of relief specially prayed on pp. 28-29) of the record as a part of this statement of the case. It is quite clear that its material averments are either expressly admitted by the answer, or impliedly from use of negatives pregnant to evade or must be taken as admitted (equity rule 30) because of general denial where the testimony shows defendant had knowledge and evaded admission or explanation. But everything alleged in the bill is proved without conflict or possibility of adverse inference. However, a chronological statement of the facts so alleged and proved; the relief sought therefrom by the plaintiff; and the defense, by avoidance, attempted by defendant, may assist the court. There was no testimony delivered orally, and no reference or report. This court will not, therefore, indulge any presumption in favor of the conclusion below.

About October 1, 1908, Ben T. Head, desiring to purchase for $100,000 the entire capital stock, consisting of 1,000 shares of the par value of $100,000 of the Savings Company, of E. N. Cullom and others, then owners, sought the aid of defendant through E. E. Galbreath, then and throughout this history its president and dominant agent. At the time the assets of the Savings Company consisted of $157,000, and its liabilities $57,000 due depositors and $100,000 capital stock (Record, p. 123). Upon arrangement then consummated between Head and Second National Bank it loaned him the $100,000 upon his note for that sum secured by the entire stock and a resolution of the directors of the Savings Company, then selected and dominated by him, authorizing the defendant in order "to secure" the note "to charge said note, or any part of it, to the account of the Alabama Trust & Savings Company, now a depositor in the Second National Bank of Cincinnati, upon three days notice to the Alabama Trust & Savings Company" (Record, p. 135).

As a part of the transaction it was agreed the Alabama bank should keep a deposit credit with defendant equal to the debt (Record, pp. 144-150). Accordingly, Head had it immediately place with defendant $135,000 (Record, p. 150). Head shortly sold out to Gus T. Brannon and Ector H. Smith whose notes were substituted for Head's; but the same arrangement otherwise continued. Head ostensibly retired, but appeared again as another character a little later (December 31, 1908), as will hereafter appear. Smith and Brannon called in other kindred spirits and transferred to them some of the stock. Each time the notes were divided in like amounts and substituted with defendant; but the plan, arrangement and understanding with defendant remained unchanged, except that in the early part of 1909, $15,800 was paid defendant, and stock of that par value taken down. This sum had been realized from stock sold by Brannon and his associates to innocent and deceived purchasers in small remote Alabama towns for $125 per share (Record, pp. 152-154 to 159). As these notes were made to defendant, Brannon endorsed them in the name of the Savings Company, so that on or about May 1, 1909, these notes and stock owned and pledged to defendant stood as follows:

Maker of Note	Amount.	Shares.	Par Value.
Gus T. Brannon.....	$15,000.00	150	$15,000.00
Ector H. Smith.....	15,000.00	150	15,000.00
W. K. Smith	10,000.00	100	10,000.00
Enos R. Stewart.....	15,000.00	150	15,000.00
James R. Lewis.....	5,000.00	50	5,000.00
Tom Stobert	10,000.00	100	10,000.00
Interstate Securities Company	14,200.00	142	14,200.00
Total	$84,200.00	842	$84,200.00

Record, pages 106, 136-137.

All of these persons were directors; Gus T. Brannon, president; Ector H. Smith, vice-president; J. R. Lewis, secretary and treasurer; and Tom Stobert, cashier, of the Savings Company. Interstate Securities Company was a corporation owned and controlled by one or more of them, and at no time did the Savings Company receive any consideration for its signature upon notes representing the loan originally made to Head (Record, pp. 134-135). Such being the situation, on or about May 1, 1909, Galbreath as defendant's representative came to Savings Company's place of business in Birmingham, Alabama, and demanded that the notes be changed so as to show that bank as maker and the makers as sureties, respectively, and that paper owned and held by the bank be transferred to defendant for security (Record, pp. 106-7, 158, 140-1). This was done (Record, pp. 107, 109-112). There is conflict in the testimony as to whether the directors, *as a board,* authorized it: but that is immaterial.

In consummation of this transaction, defendant, through Galbreath, then and there received from these officers of the Savings Company as collateral its notes receivable, many of which were secured by mortgage, given by its customers in due course of business, a schedule (by names and accounts) of which is specifically set forth in exhibit 4 to the amended bill (Record, pp. 32-37) aggregating in amount $72,557.19. A part of this $72,557.19 consisted of the Gallilean Fishermen item of $21,840; which was, without prejudice here, by an agreement made in other suits in Alabama, eliminated, reducing the total of that lot of paper to the $50,717.10 mentioned in assignment of error 3. Galbreath, fearing defendant might not otherwise get this property of the Savings Company, took it back to Cincinnati with him (Record, pp. 107, 141). The new notes made in the name

of the Savings Company and enorsed by its officers were shortly thereafter sent to defendant (Record, pp. 135-6). This breach of trust, superinduced and participated in by defendant, and the withholding by defendant of other assets of the Savings Company, under color of this simulated debt hereinafter explained, is the gravamen of the suit at bar. The court will be pleased to bear in mind that the names of makers of this paper so wrongfully taken, amounts, and due dates are specifically alleged, not denied, and specifically proved: So, likewise as to another lot, hereafter explained, of $60,038.05, assigned as error; and of $36,827, assigned as error, alleged generally and proved specifically. As soon as defendant obtained the notes so made in the name of the Savings Company, aggregating in amount $84,200, it diverted $17,200, which it had on deposit to the credit of the Savings Company, by charging that amount off (Record, pp. 44, 141, 169), and crediting $10,000 thereof on one of the notes and $7,200 on another. This was about June 11, 1909. A little later $455.33 was likewise applied, making $17,655.33, alleged in the bill, admitted in the answer (Record, p. 44) and proved. The court below gave plaintiff decree for this last named sum with interest, and no more; and, on account of such incomplete relief, plaintiff appealed.

The Savings Company owed defendant $28,000 by note for borrowed money and gave as security therefor other paper, taken in due course, aggregating said $60,038.05 (Record, pp. 108, 35-37). The testimony of defendant shows that out of collections on the collateral $27,390 of the $28,000 debt was paid, and the balance otherwise paid. (Record, pp. 176-178, table 3 to this brief.) Conceding this to be true, accountability of defendant for the lot of paper aggregating $60,038.05 would be reduced to $32,648.05.

The bill alleges that still other paper of the Savings Company aggregating about $40,000 (Record, p. 21) got into defendant's hands, for which it should account. September 4, 1909, defendant furnished a list to the Savings Company, the original of which is Exhibit I to the testimony of Ector H. Smith (Record, pp. 109 to 112). A checking of it with the other two lots ($72,557.19 and $60,038.33) shows additional names and amounts aggregating said sum of $36,827 (See Appendix Tables 1 and 2 to this brief.) For an exact understanding, it is necessary here to revert back a little. In the early part of 1909 Citizens Bank of Birmingham owed in New York $28,000 secured by collaterals. Citizens Bank was absorbed by the Savings Company, and, at the request of the latter, defendant took over the debt with the security. The evidence does not show, but it may be reasonably assumed, that this $36,827, or a considerable portion of it was this collateral, so incumbered, and so acquired by the Savings Co. This is the most favorable inference which can be drawn for the defendant. The $28,000 Citizens Bank debt had been paid down to about $25,000 May 1, 1909, and to about $23,000 September 4, 1909. The testimony of defendant showed that out of the collateral paper $1,775 was paid on this note and the balance paid from other sources (Appendix, table 4 to this brief). Conceding this to be true, accountability of the defendant for the lot of paper aggregating $36,827 is reduced to $35,052.

The court will bear in mind that the object and prayer of the bill is to call upon defendant to account for all money collected from the debtors of all this paper, and to return in specie that not collected; or, in default of returning it in specie, to pay its value of that not surrendered with interest. The scope of the suit, and the

extent of the liability of defendant, is not limited to what it may have received in disposing of the paper, or in using it for any purpose whatsoever, except that part pledged according to the terms of the pledge. This is mentioned here, as the bill and our treatment of the evidence and the points of law involved are in consonance with it, and entitle the plaintiff to a recovery of principal sums aggregating $136,072.57, with interest, as follows:

1.	$72,557.19, less Gallilean Fishermen item of $21,840.00	$50,717.19
2.	$60,038.05 less said $27,390.00 collected therefrom and applied to pay $28,000.00 note of Savings Company to defendant	32,648.05
3.	Deposits confiscated	17,655.33
4.	$36,827.00 less said $1,775.00 collected therefrom and applied to pay $28,000 note of Citizens Bank, assumed by Savings Company to defendant	35,052.00
	Total (to which interest should be added)	$136,072.57

A tabulation of items 1, 2 and 4 next supra, alphabetically arranged and analyzed, for convenient reference, follows this brief as an Appendix. (Brief of defendant in the Circuit Court of Appeals, contains a like tabulation, which is practically the same, the net difference in total amount being only $396.04. To avoid delay, that difference may be deducted.)

The said sum of $50,717.19 was for such breach of trust and wrongful diversion May 1, 1909, in Alabama, and bears interest at 8% per annum thereon from that date. To the other sums should be added interest at 6%

per annum from average due dates—say November 1, 1909, on items 2 and 4, and June 11, 1909, on item 3. None of this money or paper was returned to the Savings Company. Under color of the $84,200 of notes so issued by the officers of the Savings Company in its name for their individual debts, upon the command of the defendant, this money was misapplied and the paper retained and dissipated in transactions with others where defendant dealt on its own account (Record, p. 184). The bill and testimony gives the names, amounts and dates. There is no testimony showing any item not to have been worth face. The measure of recovery, therefore, is face and interest; the defendant, neither by answer nor proofs, having shown material matter in mitigation.

If no material defense is made, though set up and proved, recovery will not be diminished or defeated. Plaintiff moved to strike the immaterial matter from the answer, and insisted on the motion throughout.

Parts, if not all, of the matter set up in avoidance, was treated by the court below as immaterial; but a better understanding may be had by stating what the testimony in reference to it discloses. This narrative, so far, has come down to September 4, 1909; but at this point it is necessary to trace another crooked and contaminated stream originating in and with the same Ben T. Head and defendant. After Head turned over the Savings Company to the tender mercies of Brannon, Smith and defendant, he, with the knowledge and approval of the defendant, laid the basis for further frauds, as appears in Exhibit A to defendant's answer to the amended bill (Record, pp. 66-70), and is fully shown by the testimony (Record, pp. 161-165). This began during the last few days of 1908 and the first few days of 1909. Briefly stated, they organized under color of the general laws

of Alabama, ostensibly for transaction of a general banking business at Birmingham, Alabama, a corporate entity named City Bank & Trust Company (hereafter called City Bank), with a capital stock of $100,000.

Section 3446 of the Code of Alabama, 1907, authorizing formation of business corporations provides (sub 4) that the capital with which a bank will begin business "shall in no case be less than $25,000." Section 3447 provides affidavit shall be made, in case of banks, that the amount actually paid in cash be "in no case less than 60% of the capital stock." Section 3542 provides: "No bank doing business in this state shall have a capital of less than $25,000 actually paid and employed in the business, in towns of more than 25,000 inhabitants." * * *

Ben T. Head and his two brothers, shown by the testimony (Record, p. 154) to have nothing assessed for taxes, and not otherwise appearing to own anything, gave their note to defendant for $75,400 (Record, p. 184), and that amount was credited on the books of defendant to City Bank with the same old resolution of a board of directors that the note might be charged against the account at any time. With the exception of $1,100, the remainder of the $100,000 was "paid up" in a similar manner. This is shown by the testimony of Mr. Abbott (Record, pp. 161-162), an experienced expert accountant, who had examined the books and records for its receiver when it collapsed on or about October 5, 1910, and upon whose investigation said part of Exhibit A to defendant's answer is founded. To further secure this note for $75,400 that quantity at par of the stock of City Bank was pledged to defendant (Record, p. 184). So it was, that, during the time of the history herein related, defendant held at no time less than 842 of the 1,000 shares of the Savings Com-

pany and at no time less than 754 of the 1,000 shares of the City Bank, and notes for simulated debts against them in the respective amounts not less than $84,200 and $75,400. It was obviously to the advantage of the defendant for these two institutions to be merged, so that the assets of both might be used to pay the whole—making them co-sureties, as it were. What it might lack of collecting of one, it might get from the other, if merged. Besides, its assent was necessary in order to prevent both cardboard houses from collapsing. A breath would blow down either. The officers of both banks, for their individual use, and at defendant's request for its benefit, had placed the affairs of both at its mercy. This was accomplished with the knowledge and participation of the defendant. Negotiations to that end were begun sometime prior to July 12, 1909, and consummated September 25-27, 1909. Of every step the defendant was advised by letter, personal conference in Cincinnati and long distance 'phone conversation (Record, pp. 179-182). No person of any business experience can read this correspondence without concluding that defendant was a participant. Read letters dated July 12/09 (Record, pp. 179-182) and September 16/09 (Record, p. 181). No meeting of the stockholders or directors of the Savings Company was held (Record, p. 114). Many of its creditors and stockholders had never heard of the change until asked about it as witnessess in the case at bar (Record, pp. 154, 155, 156 and 158). A written memorandum was made, a copy of which is Exhibit 6 to the amended bill (Record, p. 38). As explained in the testimony, it meant that City Bank on Monday, September 27, 1909, take over the assets and liquidate the debts of the Savings Company, pay Gus T. Brannon and Ector H. Smith $10,000 by certificate of deposit of the City Bank (Record, p. 120) and take into its

management thereafter Ector H. Smith as vice-president at a salary (Record, ex. p. 388, p. 120) of $2,500 per annum, which was paid in full October 12, 1909 (Record, p. 164), Spencer at $150 per month and Lewis at $112.50 per month, and Shelby as a director. Brannon was president, Ector H. Smith vice-president, and all, except Spencer, were directors of the Savings Company. Spencer was one of its employees. Both banks, it is alleged (Record, p. 25) and proved, were at the time insolvent (Record, pp. 163 and 164). The merger was made, the certificate of deposit for $10,000 issued and given to Brannon and Smith (Record, p. 120) and Smith taken in as vice-president and Lewis and Spencer taken over as employes of City Bank. In a month or two Smith was paid $2,500 and his official connection with City Bank ceased (Record, p. 164). Defendant continued to claim the $84,200 as a bank liability to it, and held all the collateral mentioned above under color of it. This transaction of merger is alleged in the bill as a sequence of the frauds already committed against the creditors and innocent stockholders of the Savings Company. The bill alleges, in this connection (Record, p. 26): It was not within the competence of the said guilty persons or parties through such acts to defeat or take away such existing cause of action; but such acts and transactions of September 25-27, 1909, were but an additional fraud upon said innocent stockholders and creditors; and it was intended thereby by said participants in said transaction to take away from the said Savings Company all of its said remaining assets and deliver the same to the said City Bank for its use and benefit leaving the debts of said Savings Company unpaid, and depriving the said innocent stockholders of their equitable rights and interests in such remaining assets so given to said City Bank by Ector Smith.

Defendant sets up this fraud as a defense, and seeks to escape liability by alleging that the City Bank & Trust Company paid obligations of the Savings Co. in an amount in excess of the value of all the assets and property received from the Savings Co. This is immaterial; and is, moreover, not proved. The bill seeks only to hold the defendant liable for the property and assets defendant received, and asks no relief for the remaining property and assets which was received by the City Bank. The answer alleges, and the testimony of defendant shows, that the property and assets for which defendant is asked to account, was by it so mingled and mixed with its other matters that its identity was lost and can not now be traced (Record, pp. 46 and 184).

On December 31, 1909 (Record, p. 183), City Bank wrote defendant that the stockholders of Savings Company did not recognize the said debts of the officers as a liability of Savings Company and would hold defendant responsible for treating them as such. March 22, 1910, Carl Seals, then vice-president of City Bank, went to Cincinnati and made an agreement with defendant whereby one Webb gave his note to defendant for $50,000 reducing the $66,544.67 (the balance after the application by defendant of $17,655.33, as aforesaid, to the $84,200) to $16,544.67, payment of which City Bank guaranteed, defendant retaining, according to its testimony (Record, pp. 178, 184), sufficient of the paper to secure this balance, and delivered to the City Bank more than twice $50,000 of the paper (Record, p. 185). Williams, a witness for and former vice-president of defendant, testified that the records of the defendant shows that, including this spurious paper as a liability, the Savings Company owes defendant a balance of $51,477.57. To same effect, Gutting, bookkeeper and cashier of defendant, at record,

p. 186. (In this connection it may be said the district court erred on that court's own theory: for, on that theory, a recovery must be had in a sum as much as $32,-722.43, with interest; for that amount must have been paid by the Savings Company to reduce the $84,200 to $51,477.57. The paper retained by defendant to secure said balance of $16,544.67 it afterwards sold at auction in Cincinnati for $6,262.10 (Record, p. 185).

There is a statute in Alabama passed October 6, 1903 (Vol. 2 Code, 1907, p. 430), which reads as follows:

> "*3509. Marshalling Assets of Insolvent Corporations.*—The assets of insolvent corporations constitute a trust fund for the payment of the creditors of such corporations, which may be marshalled and administered in courts of equity in this state."

The same act (same Code, p. 432, § 3512) provides for decree of dissolution also; which involves distribution to stockholders, after debts are paid. (See pp. 1-2 of original brief.)

~~The appointment was made under Section 4552 of the Code of Alabama 1907, the material portion of which reads as follows:~~

> ~~"Such courts * * * may appoint agents or receivers to take possession of the property and effects of the company, and to settle its affairs, subject to such rules and orders as the court may, from time to time prescribe, according to the course of proceedings in equity."~~

Under these statutes, July 21, 1910, Mrs. Kate Rowland and other creditors of Savings Company filed a bill in the Chancery Court of Alabama, a court of general equity jurisdiction, against it, copy of which is Exhibit 7

(Record, p. 38), and amendment to which is Exhibit 8 to the amended bill (Record, p. 40). On personal service that defendant appeared, demurred August 8, 1910, and answered October 25, 1910 (Record, p. 26). April 27, 1911, a final administrative decree was rendered, appointing plaintiff receiver, and empowering and directing him to demand and take into his possession all of the Savings Company's assets and property, and "to recover the same" to be reduced to money and administered under the further orders of the court, and to that end, that the said receiver may employ counsel and may bring such actions at law or in equity as he may be advised, and incur such expenses as may be necessary as an incident thereto." A copy of this decree is Exhibit A to the amended bill (Record, p. 30). Afterwards, by decretal order of March 8, 1912 (Exhibit 2 to amended bill, Record, p. 31) plaintiff was specifically authorized by said court to institute and prosecute the suit at bar.

September 27, 1910, City Bank changed its name, but not corporate identity, to the Guarantee Bank & Trust Company, and whenever Guarantee Bank is spoken of it means City Bank under changed name. October 5, 1910, the attorney general of Alabama, Alex M. Garber, under the same statutory system, filed his bill against the Guarantee Bank in the same chancery court, and E. D. Smith was appointed receiver of its assets, and came into possession of a part of the books and records of the Savings Company given over by it with the transaction of September 25-27, 1909. Receiver Sterrett made demand for these books and records; and, on refusal, filed a petition asking the court for an order to Receiver Smith to deliver them. The petition was granted, and such parts as receiver Smith had were delivered. Defendant inter-

vened in the Guarantee Bank case, and filed for allowance its claim, as if a debt of Guarantee Bank, for $57,379.59; to which Receiver Smith filed an answer and cross-petition set out at length as part of Exhibit A to the answer in this suit (Record, p. 61 *et seq.*). Among other matters of defense and cross-petition he set up in detail the crooked transactions between defendant and the officers of the Savings Company. October 20, 1911, receiver of Guarantee Bank Smith in that case filed his report on petition for leave to compromise his differences with defendant, a copy of which is part of Exhibit A to the answer (Record, p. 75 *et seq*). This plaintiff was not a party to that case or that controversy; but his attorney in the Savings Bank case in the same court, George Hudleston, was served with notice of the application for a decree in the Guarantee Bank case authorizing the compromise between its receiver and the defendant. Neither this plaintiff nor Hudleston appeared, but E. H. Dryer appeared as *amicus curiae*, and the court provided in the decree confirming the compromise the following paragraph (Record, p. 83):

> "This decree shall be without prejudice to any rights of W. C. Sterrett as Receiver of Alabama Trust & Savings Company, or of Tuskogee Land & Security Company."

This decree is set up by defendant in this case as *res adjudicata* against plaintiff. It also sets up as a defense a suit brought in the Superior Court of Cincinnati, Ohio, by the receiver of Guarantee Bank against Second National Bank, and by him subsequently dismissed, by which a sale of the collateral retained by defendant to secure the $16,744.57, balance of the $84,200, left after the $50,000 Webb note was given, was sought to be en-

joined. It also sets up as a defense "that by reason of the laches and failure to object and take any action to prevent the full consummation of the sale and transfer (Exhibit 6 to amended bill, Record, p. 38), the said Alabama Trust and Savings Company, its creditors, Stockholders and receiver, are estopped from demanding the relief claimed in plaintiff's amended bill of complaint, if it should be found that said sale and transfer are, for any reason, void or voidable." Neither the Savings Company nor Sterrett, its receiver, was a party to the suit in the said Superior Court, and neither had notice thereof. Moreover, the case was not heard upon its merits, and was dismissed without prejudice to the rights of the plaintiff in that case (Record, pp. 186 and 192).

BRIEF OF THE ARGUMENT.

Right of Action in Plaintiff.

The clearly defined purpose of the Legislature of Alabama in passing Sections 3509 and 4552 of the Code of 1907, quoted *supra,* was to sequester the assets of insolvent state banks, to the end that they may be impartially administered in favor of all creditors; and the question of whether or not legal title to them is thereby vested in the receiver is of no importance: for the trust fund theory of the statute, as well as the equitable rights of the receiver, just as effectually hold and protect the assets of the bank for the purposes in view as if the legal title were in the receiver.

Oates v. *Smith,* 176 Ala., pp. 45-46.

The statute invests him with rights and duties of a kindred character of those of a trustee in bankruptcy, including the right to sue.

Hundley v. *Hewitt,* 195 Ala., 647, at pp. 649, 650 (1) and 654.
Bernheimer v. *Converse,* 206 U. S., 516.
Converse v. *Hamilton,* 224 U. S., 243, 244.
Goss v. *Carter,* 156 Fed. (5 C.C.A.), 746, at pp. 150-51.
Howarth v. *Lombard,* 175 Mass., 570.
Howarth v. *Angle,* 162 N. Y., 179.

These statutes, giving the receiver the right and authority to collect and distribute the assets of insolvent corporations and settle their affairs, were not designed to absolve the guilty from liability. The means conferred to accomplish justice are not designed to be instruments of its destruction.

> "A receiver of an insolvent national banking association, for instance, may enforce for the benefit of shareholders, creditors, or depositors, any liability of its directors for non-performance or negligent performance of their duties. Doubt has arisen upon the question whether he can impeach corporate acts, or whether his title being derivative, he can do anything except what his assignor, the corporation, could have done. The answer to this is that he is not in a strict sense the assignee of the corporation, but is the officer of a court of equity appointed to impound the assets of the corporation, and to administer them for the benefit of all parties interested in them; the United States or the state first to whom the corporation may be indebted for taxes or other public dues; next the lien of preferred creditors; next the general creditors; and finally the shareholders, standing not as the representative of the corporation exclusively, but as the representative of all parties interested in its assets. The better opinion is that like an assignee in bankruptcy, he may

disaffirm acts done by or in the name of the corporation which are illegal and in violation of the rights of its creditors. He may, for example, maintain an action to set aside illegal transfers made by the corporation of securities belonging to it."

10 Cyc., pp. 836-837, and cases cited.

"A receiver of an insolvent corporation in a creditors' action to administer its affairs for their benefit is a trustee of corporate assets in the right of the corporation for such creditors, and for the latter in their right as to all liabilities to which they may properly resort as a class not enforcible by the corporation.

"The last foregoing rule includes persons who may have obtained property of the corporation in fraud of its creditors. They are constructive trustees for creditors, and their liabilities as such may properly be directly established in the creditors' suit.

"A trust to the property having been established, the trustee can not end his relations to the *cestui que* trust by destroying the identity of the subject of the trust.

"Such identity being lost, a trustee is yet liable to account in equity to the beneficiary for the loss."

Harrington v. *Gilchrist*, 121 Wis., page 133.
34 Cyc., 401, and cases cited; also, page 391c, and note.
23 Am. & E. Enc., 2d Ed., 1078, and cases cited.
5 Thompson Corp., 6939, 6950, 6952, 6953, 6961.
High on Recrs., 4th Ed., Section 320, and cases cited.

CAUSE OF ACTION.

The Savings Company was an Alabama state banking corporation. The act of defendant through Galbreath,

done in Birmingham, Alabama, whither he had gone for the purpose on or about May 1, 1909, of inducing its officers to violate the trust and to deliver the paper aggregating $72,557.19 as security for their individual debts to defendant, created instantly an equitable right of action to cancel the spurious notes and to account for and restore the subject-matter of the fraud, which resides in the plaintiff, for neither the corporation, nor its innocent stockholders and creditors (whose rights are severally represented by plaintiff) were bound by such an illegal use of its name and diversion of property by its officers for their individual use. Under the laws of Alabama the act was *ultra vires* and void, and could not be given validity even by stockholders.

In no state has the stern morality of the law condemning such acts been more strongly expressed or more relentlessly applied than exists in Alabama, where it is fully and clearly declared in the case of *Steiner & Lobman* v. *Steiner Land & L. Co.*, 120 Ala., 128. As the principles announced in that case are also applicable to the act of Ector H. Smith in giving over, with defendant's assent, September 25-27, 199, of the remaining assets of the Savings Company to the City Bank, a liberal excerpt may be taken therefrom (pp. 139-142), viz.:

> "It is conceded by defendant that J. M. Steiner, as president of the corporation, had no special authority to indorse these particular notes or to execute these particular deeds; but it is contended that the general power to indorse notes for others and to dispose of lands of the corporation in discharge of the liability thereby incurred, was vested in the corporation, and the authority to execute this power was conferred on its president, by this amendment to the by-laws; or if the attempt to amend the

by-laws in this respect was void, that, as shown by the signatures to the above mentioned petition and by the vote on said amendment, the whole body of the stockholders had consented to the exercise of this power by the corporation, through its president, and that the act was one which the whole body of stockholders could authorize in the first instance, or ratify after performance. The general rule which prevails in this country is, that corporations created by an act of the Legislature, or organized under the general laws, can exercise only the powers expressly granted, the implied power to do all acts necessary to enable them to exercise the powers expressly granted, and such incidental powers as pertain to the purposes of their creation. The charter of the corporation, together with the general laws of the state of its creation, is the measure of its powers, and the enumeration of these powers implies the exclusion of all others, except such as are incidental or necessarily implied. The source of its powers is the Legislature, and not its stockholders, and the unanimous consent of the latter can give it no right to engage in transactions foreign to the object of its creation. *Central B. R. & B. Co.* v. *Smith,* 76 Ala., 579; *Chewacla Lime Works* v. *Dismukes,* 87 Ala., 344; *Ala. Gold Life Ins. Co.* v. *Cent. Agr. & Mech. Asso.,* 54 Ala., 77; *Thomas* v. *Railroad Co.,* 101 U. S., 82; *7 Am. & Eng. Ency. of Law* (2d Ed.), 695 *et seq.* Hence, it is not competent for the stockholders by the adoption of by-laws or amendments thereto, to enlarge or extend the powers of the corporation beyond the scope authorized by its charter and the general laws. In so far as its by-laws are inconsistent with the object of the corporation and the spirit and terms of its character, or attempt to authorize the corporation to perform acts

beyond its charter powers, they are void, although adopted with the unanimous consent of the stockholders—*Supreme Commandery, etc.*, v. *Ainsworth*, 71 Ala., 436; *5 Thompson on Corp., § 5991; 5 Am. & Eng. Ency. of Law (2d ed.), 95.* Although a corporation has implied power to make and indorse negotiable notes and bills in carrying on its lawful business, yet it is well established, as a general rule, by the great weight of authority that it has no power to make, indorse, or accept, for the mere accommodation of others, notes and bills in which it has no interest, unless such power is expressly conferred, or is incidental to some other power expressly conferred. *Green's Brice's Ultra Vires*, 252, note; *7 Am. & Eng. Encyc. of Law* (2d ed.), 793; *National Park Bank* v. *Germ. Am. Mut. Warehousing, &c., Co.*, 116 N. Y., 281; *National Bank* v. *Young*, 41 N. J. Eq., 531; *Tod* v. *Kentucky Un. Land Co.*, 57 Fed. Rep., 47; *Hutchinson* v. *Sutton Mfg. Co.*, 57 Fed. Rep., 998. There are cases in which the indorsement of the paper of others has been upheld, but in each instance the transaction was but the means adopted to carry out the legitimate objects of the corporation and conduct its authorized business, made necessary or expedient by peculiar circumstances. No such circumstances existed in the present case. The indorsement was made purely for the accommodation of the firms of Joseph Steiner & Sons and Steiner Bros & Co., composed of four of the ten stockholders of the complainant corporation, and the corporation was in no way interested in its debt or in its being secured. The effect of the indorsements and subsequent conveyance of the property of the Steiner Land & Lumber Co., in payment of the supposed liability incurred thereby, was simply the payment with the corporate prop-

erty of the individual debt of the four stockholders of the corporation who composed the firms of Joseph Steiner & Sons and Steiner Bros. & Co. It results that the so-called by-law by which it is attempted to uphold the indorsements and conveyances, if it can be construed as an attempt to authorize the corporation to indorse, for the mere accommodation of others, notes and bills in which it has no interest, is repugnant to the charter powers of the corporation and therefore void, whether such indorsements are beyond the power of the corporation, or merely beyond the power of less than the whole body of stockholders. It is insisted that, although the by-law may be void as such—having been adopted by only five of the stockholders—yet the power to indorse for the mere accommodation of others, notes and bills in which the corporation has no interest, is one which the whole body of the stockholders may concur in authorizing, and that all the stockholders did concur in authorizing the exercise of this power by the corporation, thereby rendering valid the particular indorsement complained of. It has been held that, although an act or contract may be *ultra vires* of the corporation—one which the corporation has no power to perform or enter into—yet, if it is not opposed to public policy, or illegal *per se*, or *Malum Prohibitum*, it may be ratified and rendered binding by the entire body of the stockholders; and there is a *dictum* to this effect in *Jordan & Co.* v. *Collins & Co.*, 107 Ala., 576. While all the stockholders may, by ratification, undoubtedly render binding acts done which are within the powers of the corporation, but *ultra vires* of its officers, or of a mere majority of its stockholders, the doctrine contended for can not be maintained in those jurisdictions where the principle prevails that a

> corporation is forbidden to exercise any powers not expressly conferred, without totally abrogating the principle. To permit the stockholders to authorize acts beyond the power of the corporation to perform, or to render such acts binding by subsequent ratification, is simply to permit the usurpation by the stockholders of authority which resides in the Legislature alone, and to make the stockholders, instead of the Legislature, the source of corporate power. *Thomas* v. *Railroad Company,* 101 U. S., 83; *National Trust Co.* v. *Miller,* 33 N. J. Eq., 155; *The Ashbury Railway Carriage & Iron Co.* v. *Riche,* L. R. 7 H. L., 653; *Green's Brice's Ultra Vires,* 550; *27 Am. & Eng. Encyc. of Law, 403.*"

To the same effect is the prior case of

Chambers v. *Faulkner,* 65 Ala., 448,

and the later case of

Gulf, etc., Co. v. *Chapman & Co.,* 159 Ala., 444.

There is no pretense that the act of Ector H. Smith in turning over, bodily, the remaining property and affairs of the Savings Company to the City Bank was done under color of any authority attempted to be given by stockholders. As Smith said in his testimony (Record, pp. 119-120), "We were going to shove the responsibility, if they (City Bank) wanted it." This transaction was but a sequence—a natural result—of the looting of the Savings Company on May 1. The defendant had a large quantity of its paper and had confiscated its cash. The City Bank had been organized fraudulently and defendant had been advised of every step so taken and gave its approval thereto (Record, pp. 179-182). The defendants' interests lay in deferring the crash by having City Bank take over the affairs of the Savings Bank and

assume the payment of these spurious debts. The scheme was put in full operation. That it was with defendants' co-operation may be readily understood, when it is remembered that a little later, December 31, 1909 (Record, p. 183), defendant was informed by the City Bank that the stockholders of the Savings Company repudiated the simulated debt and would hold defendant responsible for diversion of assets.

The transaction of the giving over of the assets of the Savings Company to the City Bank, was but a new fraud committed in an effort to cover up the first. Defendant was a principal in the first and a principal in or accessory to the second. But this fraud could not absolve defendant of liability for that of which plaintiff complains, and which had then been already fully consummated. The defendant continued to hold the paper which it had obtained from the officers of the Savings Co. under color of the original fraudulent transactions. It is a desperate resolution which would defend either of these acts of spoliation, and announce a doctrine, new in law, that tort-feasors may absolve themselves from the consequences of one crime by the commission of another; or that they may, by contract among themselves, agree not to be liable to a third person for a wrong already committed. But for the amount involved such attempt would hardly be made. Consider the obliquity, moral and legal, civil and criminal, of the conduct of a managing agent in delivering to another the goods in trade of his master upon an agreement to assume liabilities, including $84,200 of his individual debts, pay to him individually $10,000, and to give him a salaried official position with grantee as a part of the consideration! Such was the transaction (*supra*) by which the City Bank attempted to take over the Savings Company; and

it paid Ector H. Smith the entire $2,500 in two weeks afterwards (Record, p. 164).

The directors of a private corporation occupy a fiduciary relation and are required to exercise their best care and judgment in the interest of the corporation; and they can not be allowed to exercise the powers confided to them (even where the act is *ultra vires*), to the detriment of the corporation, in advancement of their own private interest. "The law, therefore, will always condemn the transaction of a party in his own behalf when, in respect to the matter concerned, he is the agent of others, and will relieve against them whenever their enforcement is seasonably resisted—and he may be called to account in a court of equity."

Davis v. *Las Ovas Co.*, 227 U. S., 80, at p. 87.
United States v. *Carter et al*, 217 U. S., 286, at p. 305.
Kilbourn v. *Sunderland*, 130 U. S., 505, at p. 515.
Wardell v. *U. P. R. R. Co.*, 103 U. S., 651, at p. 658.
Jackson v. *Ludeling*, 88 U. S., 616, at p. 623.
Koehler v. *Black Co.*, 67 U. S., 715 (6), at p. 721.
Hall & Farley v. *Ala. Ter. Co.*, 173 Ala., p. 414.
De Bardeleben v. *Bessemer Co.*, 140 Ala., 621.
Peckham Iron Co. v. *Harper*, 41 O. S., 100, at p. 108.

Where actual fraud exists, a guilty participant as against creditors, will not be allowed to assert any right founded thereon. In Alabama, where these transactions occurred, a fraudulent purchaser of property can not be reimbursed for prior incumbrances discharged by him.

Prichett v. *Jones*, 87 Ala., p. 320.
Wiley v. *Knight*, 27 Ala., 336.

"The authorities all concur that a transaction or conveyance which is actually fraudulent, as

distinguished from fraud in law merely, is void *in toto* and can not be permitted to stand for any purpose, whether of indemnity or reimbursement, to those other than the debtor whose funds have contributed to the consideration paid or of cutting out and securing to them a part of the subject-matters proportionate to the amount paid."

First Nat. Bk. v. *Kennedy,* 91 Ala., 477.

OBJECTION FOR WANT OF PARTIES DEFENDANT.

Two years after the original bill was filed, and twenty-three months after the original answer was filed, and not until, against plaintiffs' objection, the original submission upon the merits, as disclosed by the testimony, had been set aside by the judge of the district court, the defendant, in its answer to the amended bill, set up (Record, p. 48), "that said City Bank & Trust Co., The Guarantee Bank & Trust Co. and said E. D. Smith, as Receiver of the Guarantee Bank & Trust Co., are necessary and indispensable parties to this suit * * *." The City Bank and the Guarantee Bank were the same, were insolvent, and under bill filed subsequent to the Rowland bill, were under administration in the same state chancery court. Smith was reveiver. A decree for or against plaintiff could not possibly affect him. We seek nothing of him. He has compromised his quarrels with defendant; but if he had not, it would make no difference here. The scope of the bill and its prayer are to limit the right of recovery to defendant alone. The relief sought is an accounting: *first,* for money collected on all the lots of paper; *second,* for the money confiscated and the money of Alabama Trust & Savings Com-

pany paid on the spurious notes; *third,* for a return in *specie* of the parts of the lots of paper not collected, or in default of return in *specie,* for the value thereof, irrespective of what may have been received for it; and, *fourth,* discovery to make full and effective the accounting. Under such a bill, it is of no consequence with whom defendant dealt in disposing of the paper, and thereby rendering itself unable to restore in *specie.* We do not seek to follow in specie such part as may have gotten from the hands of defendant into the possession of the City Bank nor into the hands of the purchaser in the sale made by defendant. That they took with guilty knowledge can no more affect the individual liability of defendant to account on its own responsibility than could the receiving of stolen goods with kndwledge affect the direct liability of the thief to the owner. In cases bottomed on breaches of trust of corporate officers, the tortuous character of the act makes the original wrongdoers severally liable, and it is optional with the plaintiff to sue any or all in equity for an accounting for such breach of trust.

Davis v. *Las Ovas Co.,* 227 U. S., 80, *supra.*
Clay v. *Waters,* 161 F. (8 C. C. A.), 815, 819, *supra.*

The rule is the same in admiralty.

The Beaconsfield, 158 U. S., 303.

In the United States courts, jurisdiction depending on diverse citizenship is not ousted by failure to make defendant in equity a person out of reach of the trial court, unless the decree will inevitably affect him. He must be an indispensable, as distinguished from a proper, or even necessary, party.

The Judicial Code, Section 50;
Orig. Eq. Rule 47, new 39.

The reason why the court does not proceed in cases in the absence of indispensable parties is because it can not. Its decree, when rendered, would be nugatory. It would not divest title, where divestiture is essential to relief.

THE GUARANTEE BANK RECEIVER CASE.

The plaintiff, not being a party to the Guarantee Bank case, is not bound by anything which may have occurred therein, or by any suit its receiver may have brought in which he was not a party. The administration suit in the Savings Company case was instituted, and the jurisdiction impounding its assets attached, several months before the bill in the Guarantee case was filed. The filing of the bill with service placed the property *in custodia legis.*

Belmont Coal Co. v. *Columbus Iron & Steel Co.,* 46 Fed., 9-10.
Acme Harvester Co. v. *Beekman,* 222 U. S., 300.
International Bank v. *Sherman,* 101 U. S., 403.

The chancery court in which both cases were pending was careful that there should not be even appearance of conflict. Hence, in the decree confirming the compromise it was expressly provided it should be "without prejudice to any rights of W. C. Sterrett as Receiver of the Alabama Trust & Savings Company." With this clause in the decree, this plaintiff would not have been affected, though he had been a party in that proceeding.

Collins v. *Smith,* 155 Ala., 607.
Long's Heirs v. *Waring,* 25 Ala., 625.
40 Cyc., 2130.

As to the injunction suit brought by the receiver of Guarantee Bank against the defendant in the Ohio state court it is sufficient to say, that the receiver of the Guarantee Bank did not have in charge the administration of the affairs of the Savings Company, and this plaintiff was not a party to that suit. Moreover, the suit for an injunction was not heard upon its merits and the injunction was refused, the court holding that plaintiff had an adequate remedy at law (Record, p. 192).

Estoppel and Acquiescence and Laches.

Upon the defense of estoppel the quotation *supra* from the opinion in the case of *Steiner & Lobman* v. *Steiner Land & Lumber Co.*, 120 Ala., 139, is sufficient answer. No estoppel or waiver by acquiescence can arise where the thing could not be directly done. There is uncontradicted testimony of creditors and of stockholders that they knew nothing of these transactions until the time they were under examination as witnesses in this case. Some of the stockholders were infants of tender years. There is nothing in the testimony to show that, with the exception of the guilty persons, any stockholder or creditor of the Savings Company did, or omitted to do, anything to raise an estoppel, or to indicate acquiescence or laches, on his part. Diligence was exercised. The bill was filed July 21, 1910 (Record, Ex. 7, p. 39); the suit defended against, and administration decree rendered April 27, 1911 (Record, p. 30); institution of this suit specifically authorized March 9, 1912 (Record, p. 31); and the suit brought May 12, 1912. The facts were concealed by the defendant, even in this case, until after the first submission was set aside. When the witnesses

for defendant were first examined in Cincinnati it would not permit its books upon the details to be gotten before the court in this case (Record, pp. 140, 144, 149, 150). It is hardly in a position to invoke estoppel, acquiescence or laches.

It is well settled, also, that one pleading an estoppel must show that he has changed his position to his own injury by reason of some act or representation of the party against whom the estoppel is invoked. In other words, the defendant, Second National Bank, must show that the Savings Company, acting with authority to bind its stockholders and creditors, or its receiver, plaintiff herein, caused the defendant to change its position in some respect whereby it sustained a loss or damage. There is not a word of testimony to this effect, whereas the record shows conclusively that the Second National Bank was the prime mover or an active participant, in every transaction of which we complain.

> "Estoppel arises only when the person sought to be estopped has done some act or made some admission with the intention of influencing the conduct of another, or that he had reason to believe would influence the conduct of another, and which act or admission is inconsistent with the claim he is now making."
>
> *Welty* v. *Vulgamore,* 1 Ohio C.C.(N.S.), page 553.

Also,

Ensel v. *Levy,* 46 O. S., 255.

As to laches, the Supreme Court of Ohio, in *Paschall* v. *Hinderer,* 28 O. S., 568, has held that:

> "Length of time is no bar to a trust clearly established, and where fraud is imputed and proved, length of time ought not to exclude relief."

To the same effect—

McIntire v. *Pryor,* 173 U. S., 38.

Also,

Lowering v. *Palmer,* 118 U. S., 321.

Measure of Recovery.

From the moment of the delivery of the collateral, amounting to $72,557.19, a right of action, at the instance of the corporation, as well as at the instance of its creditors, existing and subsequent, for a return of the entire $72,557.19 in specie, or, in default of return, the face value thereof with interest from that date; unless, as defensive matter, the defendant in this case shows, by legal and satisfactory evidence, to the court, that its value was then less than face, and how much less. The same principle is applicable to the balance of the batch of collateral, amounting to $60,038.05, described specifically in the bill, and the still additional collaterals alleged generally and proved specifically, amounting to $36,827, after deducting from the last two items the indebtedness to defendant of Alabama Trust & Savings Company, which indebtedness was subsequently paid off and fully discharged, and less, also, from the $72,557.19 (by reason of the agreement mentioned above) the Gallilean Fisherman paper, of $21,840.

If the administration suit and receivership had not intervened, a right of action in the name of, and for, the corporation would have lain, under the well-known rules governing such suits of minority stockholders; and the amount of recovery would not have been limited to an aliquot part of the property, or of its value, taken from the corporation by such breach of trust, but the entire

fund. The case is not different where the receiver, as the representative of the creditors and of the defrauded corporation, sues. After the costs and expenses of administration, and creditors, are paid, the surplus goes to the corporation, if in existence; and, if dissolved, *pro rata* to the stockholders who choose to intervene. With this distribution, and the amount required to completely effect it, the court in which the plenary suit is pending has no concern. Its business is with the wrong committed and the *quantum* of property thereby wrongfully diverted.

Eau Claire National Bank v. *Jackman, Trustee in Bankruptcy*, 204 U. S., 522, 527, 536, 537.
Moore v. *Robinson*, 6 O. S., 302.
Richards v. *Skiff*, 8 O. S., 586.
Faran v. *Robinson*, 17 O. S., 243.
Loudenbach v. *Collins*, 4 O. S., 251.

That all of these collaterals continued to be held by the defendant in this case, by reason of and on account of, this pretended liability—first, of $84,200; and afterwards, March 22, 1910, for $66,547.67; after payments were made thereon as appear by defendant's answer as follows: June 11, 1909, $17,200; July 9, 1909, $55.33; August 3, 1909, $300; August 30, 1909, $100—though other matters were intermingled, is clear, beyond a doubt; for, on March 22, 1910, after all of the *bona fide* indebtedness of the Alabama Trust & Savings Company to the Second National Bank had been paid off and discharged, the defendant released City Bank & Trust Company (which it claimed to be liable for the $66,547.67 under the paper of September 25, 1909) from $50,000, taking from it the Webb note for that sum, and the City Bank guaranteed the balance of $16,544.67, defendant reserving collaterals supposed to be sufficient to cover. Subse-

quently, on December 30, 1910, or January 1, 1911, such of the collateral as then still remained were sold by defendant, on account of this same spurious indebtedness, and $6,282.10 realized therefrom (Defendant's witness, Record, p. 185). Hence it appears by the undisputed testimony, that the defendant dealt with the remaining collateral on hand after the *bona fide* debts of Alabama Trust & Savings Company had been paid in connection with, and as if held for, the unpaid balance of these spurious notes. Under such circumstances, it can not be held guiltless in a court of equity, and the measure of the guilt is the value of that which was so wrongfully held.

Until the contrary is proved, paper is presumed to be worth face value.

> 38 Cyc., 2097, and cases cited;
> 28 Am. & Eng. Enc. Law, 2d Ed., 726, and cases cited.

This presumption is not to be rebutted by evidence that only so much was at some late date, received by sale or other disposition of the paper. A sale at Cincinnati would certainly not be a fair test; nor could it be justly said that a price paid by the insolvent City Bank in further prosecution of its scheme of looting the Savings Company should fix the standard of value.

It is a matter of common knowledge that a sale, public or private, of choses in action furnishes no criterion of value; and such sale, for that reason, may not be made by a pledgee himself unless authorized by the contract. Says Colebrooke on Collateral Securities, § 117, second edition:

> "The pledgee of negotiable instruments, such as bills of exchange and promissory notes, so as to become a party thereto as collateral security

for the payment of a principal note or obligation, is not entitled, upon demand of payment and default of the principal debt, and notice to the pledgor, to offer such negotiable collateral securities, at either public or private sale, in the absence of authority by special contract so to do. Negotiable collateral securities such as bills and notes, are held by the pledgee under a *quasi* trust in favor of the pledgor, and are of such a character that a public or private sale is generally made at a sacrifice. The solvency or circumstances of parties to the collateral paper may not be well known, and few persons will purchase, and those for speculation, and at low prices. The pledgor is not required to submit his negotiable collateral securities to an ordeal to which commercial paper is unusually subjected, and which must be destructive of its value except in rare cases."

In mitigation of damages, the defendant may show insolvency of the maker or obligor in the particular bill or note; but, even then, the fact that he became insolvent after the conversion does not relieve from liability for the face value, and interest, where at the time of the wrongful act the maker or obligor was solvent, which he is presumed to have been in the absence of proof to the contrary.

28 Am. & Eng, Enc. Law, 2d Ed., 726-727, and cases cited in notes.
38 Cyc., 2082 (B), and cases cited in note 10 on page 2083.
Randolph on Commercial Paper, § 1732.
Jones on Collateral Securities, § 575.
St. John v. *O'Connell,* 7 Porter (Ala.), pp. 481-2.

In the case of *Cook* v. *Chaney,* 14 Ala., at page 67, the Supreme Court of Alabama says:

> "In an action of trover for the conversion of a note, it has been held that the measure of damages is the amount due on its face, unless it is proved that it is of less value. *Ingalls* v. *Lord*, 1 Cow, Rep., 240; *St. John* v. *O'Connell*, 7 Porter (Ala.), 466; *Romig* v. *Romig*, 2 Rawle's Rep., 241; *Rogers* v. *Crombie*, 4 Greenl. Rep., 276."

In the case of *Eau Claire National Bank* v. *Jackman, as Trustee in Bankruptcy*, 204 U. S., 522, an effort was made to limit the amount of the recovery by reason of the character of the claims propounded in the court of bankruptcy having charge of the administration, and the supposed needs of the court of bankruptcy in making distribution. The Supreme Court of the United States summarily disposed of the question by saying:

> "The bank also contends, in effect, that in such suit the validity of all other claims against the bankrupt can be litigated, and whether they have received voidable preferences and have not been required to surrender them. The broad effect of the contention repels it as unsound. To yield to it would transfer the administration of a bankrupt's estate from the United States District Court to the state court."

The case of *Globe Bank & Trust Co.* v. *Martin, Trustee in Bankruptcy*, 236 U. S., 288, was where a transfer fraudulent as to three creditors, but not as to others, was attacked by the three within four months of bankruptcy of the grantor, though the transfer was made long before. The trustee in bankruptcy also sued in the state court, and the suits were there consolidated, and the transfer held void as to the three, but valid as to all others. The state court appointed the trustee in bankruptcy its special commissioner to sell. Though it did

not order the proceeds paid to the trustee in bankruptcy, it intimated that the trustee in bankruptcy ought to receive and hold only so much as measured the gross amount of the claims of the three creditors, and that the excess ought to be paid to the grantee. When the case went to the Kentucky Court of Appeals (124 S. W. Rep., 879) that court said:

> "The judgment [of the lower court] does not undertake to dispose of the proceeds that may be realized from the sale of the property, but leaves this question open for future determination, and we do not doubt that, when the court comes to make an order concerning the disposition of the proceeds in the hands of the trustee as special commissioner, it will direct that the proceeds be paid over to the trustee in bankruptcy to be administered as a part of the estate of the bankrupt in the bankruptcy court. In anticipation of what we assume the court [below] will do, we may with propriety in this opinion direct that it make such orders. If the court in the judgment had undertaken to divest the trustee of the control of this fund we would upon this point reverse the judgment with directions to proceed as indicated," etc.

This was a delicate, but firm, declaration to the lower court that its business was limited to setting aside the transfer, selling the property involved, and turning over the fund derived from it to the court having jurisdiction of the administration and the exclusive authority to determine to whom it should go. The principle was affirmed when the point got to the Supreme Court of the United States, which quoted with approval what is quoted *supra,* and ended its opinion by saying:

> "* * * after the conveyance was set aside in the state court, * * * it [the court of

> bankruptcy] had the right to determine for itself the disposition of the fund arising from the property sold."

And cites with approval the case of *Miller* v. *New Orleans Fertilizer Company,* 211 U. S., 507, which is to the same effect.

Said the court upon this point, in the case of

Porter v. *Sabin,* 149 U. S., 473:

> "The whole property of the corporation within the jurisdiction of the court which appointed the receiver, including all its right of action, except so far as already disposed of under orders of that court, remains in its custody, to be administered and distributed by it. Until the administration of the estate has been completed and the receivership terminated, no court of the one government can by collateral suit assume to deal with rights of property or of action constituting part of the estate within the exclusive jurisdiction and control of the courts of the other."

The amount which a receiver may recover in a case of this nature is not fixed by the number and amounts of claims which may be filed. His right of action and the measure of damages is not determined by the fact, or probability, of who has, or may in the future, propound claims; nor by the character of such claims. The time within which claims may be filed, and whether the estate will be opened to allow additional claims to be filed, is of no concern to the court holding the plenary suit. If the cause of action were so gauged, plenary suit could not be instituted and prosecuted to final decree until the court of administration had closed its books of entry, and given to the court of plenary suit a trial balance sheet showing

all of its needs, including costs and administration expenses. Until such time, the amount would vary daily, depending upon new claims filed, old claims rejected, and new costs and expenses incurred. The situation would be further complicated: if additional plenary suits were brought, each defendant could successfully plead the other on the ground that recovery in the one would be sufficient to pay creditors who, up to that time, had filed claims against the estate.

If a restitution suit were brought against a guilty recipient from guilty officers (as here) before any claims were filed, there could, on this theory, be no recovery. The statement of the proposition is its own refutation. Moreover, the instant the court of plenary suit invades the province of the court of administration and assumes to anticipate its needs, it must, of necessity, take stock of its wants—costs, allowances and expenses, and what should be paid each creditor and stockholder—in short, usurp and take control of the estate and of its administration.

All the testimony below was taken by deposition. From the pleadings and proofs, according to the law applicable to the case, the plaintiff is entitled to a decree for $136,072.57 as analyzed *supra*, pp. 5, 6,6*a* and 7), principal sums, with interest at 8% per annum on $50,717.19 thereon from May 1, 1909, on the $17,655.33 from June 11, 1909, and on the balance at 6% per annum for the average due dates, say, November 1, 1909. Of these items, $50,717.19 (constituting the $72,557.19 lot of paper less the Gallilean Fisherman item of $21,840) with interest from the time of its diversions in Alabama at the rate of 8% per annum from May 1, 1909, and the cash confiscated, aggregating $17,605.33, with interest from June 11, 1909, consisted of misapplications by defendant of

assets of the Savings Company prior to September 25-27, 1909; and the district court, on its own theory, should have rendered a decree for the value of that paper as well as for the cash confiscated.

Motion and Petition of Defendant.

Some time after final decree (Record, p. 101) defendant moved the court to transfer the case to the law side of the docket, and for leave to amend its answer. This was but an application to vacate the judgment, which the court did not see fit to do. Such discretion, if the judge had a discretion, is not, of itself, a subject for review by this court.

CONCLUSION.

As the amended bill is specific in averment of circumstances, names and amounts; and none of its material averments are put in issue by the answer thereto, treatment of the case for the plaintiff at this length is, perhaps, unnecessary; but the brief is full to meet any point which the court might consider as having a bearing, direct or remote.

Respectfully submitted,

Edmund H. Dryer,
Counsel for Petitioner.

Philip & S. C. Roettinger,
Of Counsel.

Copy of this brief has been furnished counsel for defendant, Second National Bank of Cincinnati, Ohio, and is acknowledged, this ——, 1918.

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Counsel for said Defendant.

Appendix.

Table 1—First column of this table is the paper make-up $72,557.19, constituting Exhibit 4 to the amended bill, alphabetically arranged, not denied and proved without conflict (Record, pp. 32-34, 107).

Second column of this table is the paper making up $60,038.03, constituting Exhibit 5 to the amended bill, aphabetically arranged, alleged, not denied, and proved without conflict (Record, pp. 37-38, 109-111).

Third column is Exhibit 1 to the testimony of Ector H. Smith (Record, pp 109-112) and is a copy of the statement furnished about September 4, 1909, by the defendant to Alabama Trust & Savings Company, the original of which was offered in evidence. The items appearing in that column which do not appear either in the first or second column constitute additional paper of Alabama Trust & Savings Company held by defendant and are separated and listed in *Table 2* below:

Name of Maker	$72,557.19 Lot.	Lot $60,038.03.	Sept. 4-09 statement.
Coal & Ore Co. ..	$ 501.32 9-1-09		$ 501.32 6-11
Paper Co.	400.00 8-6-09		400.00 8-6
erican Adv. Sales Co.	500.00 6-22-09		
Do	1,000.00 9-10-09		1,000.00 9-10
Do		$ 500.00 9-5-09	500.00 9-5
Do		1,000.00	1,000.00
Do			500.00 11-1
Do			1,000.00 11-1
rd, B. A.		1,000.00 11-8-09	1,000.00 11-8
Do		1,000.00 10-15-09	1,000.00 10-15
Do			1,000.00 10-15

Ala. & Ky. Coal Co. ..					300.00 7-1
Bank of Red Bay	5,000.00	11-1-09			5.000.00 11.
Bowles, C. H.	5.300.00	12-28-09			5,300.00 12-
Banning, H. M.	1,250.00	12-28-09			1,250.00 12-
Burdick-Corbin Co. ...	350.00	10-3-09			350.00 11-
Brown, W. A.	250.00				250.00 12-
Barnes, C. B.	135.00	11-15-09			135.00 11-
Burns, C. G.	97.20	12-25-09			97.20 12-
Bennett, J. E.	425.00	7-21-09			425.00 10-
Do					300.00 7-2
Brown, T. J.	125.00	11-1-09			225.00 11-
Bodeker, G. H.	100.00	7-12-09			100.00 8-1
Butler, C. H.	500.00	11-24-09			500.00 11-
Do	350.00	10-15-09			
Do	500.00	5-24-10			500.00 5-2
Do			600.00	11-26-09	600.00 11-
Do			750.00	11-1-09	750.00 11-
Do			350.00	10-15-09	350.00 11-
Do			600.00	11-15-09	600.00 11-
Do					350.00 11-
Do					500.00 12-
Blackwood, E. J.	45.00				45.00 2-1
Do	45.00				45.00 8-1
Do	37.50				37.50 2-1
Do	37.50				37.50 8-1
Do	30.00				30.00 2-1
Do	30.00				30.00 8-1
Do			750.00	2-10-12	750.00 2-1
Butt & Tate			263.35	11-1-09	205.35 11-
Barnett, Paul et al			200.00		
Bank of Phebe			3,105.00	11-1-09	3,105.00 11-
Bell, E. W. et al			900.00		700.00
Barber, W. W.					500.00 6-2
Bowden, R. E.			450.00	8-2-09	
Crane, Hugh C.	200.00	7-1-09			200.00 7-1
Cullom, Smith Jr.	200.00	8-15-09			200.00 8-1
Cull, F. C.	250.00	5-24-10			250.00 5-2
Chitwood, W. J.	125.00	12-1-09			
Chitwood, W. G.	125.00	12-1-09			125.00 12-

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arlisle, M. L.	1,800.00	11-1-09			1,800.00	11-1
arlisle, M. L. et al ...			200.00		200.00	9-7
larke, Percy	100.00	10-4-09			100.00	10-4-09
larke, Percy et al ...			150.00			
osper, W. D. & Co. ..			1,000.00	10-25-09	1,000.00	10-25
Do					1,000.00	11-25
hancellor, W. C.			266.62	10-5-09	206.62	10-5
hapin, H. E.			300.00			
oxe, C. P.					5,000.00	
rawford, E. M.	375.00	11-15-09			375.00	8-26
henoweth, W. A. Jr. .					100.00	10-1
oan & Brewer, ...	500.00	10-24-09			500.00	10-24
oan, W. L.	300.00	10-14-09			300.00	10-14
ean, J. H.	1,000.00	11-18-09			1,000.00	11-17
uff, W. S.	1,000.00	12-28-09			1,000.00	12-28
ean, J. P.	108.00	12-25-09			108.00	12-25
earborn, A. R.					1,000.00	11-1
Do					250.00	
oan, Flora P.					2,000.00	2-25
llis, John E.	300.00	9-15-09			300.00	9-15
ersole, C. D.	80.00	9-26-09			80.00	9-26
Do	168.00	5-23-10			168.00	5-23
Do	189.00	5-23-10			189.00	11-23
Do	147.00	11-23-09			147.00	11-23
Do	160.00	9-26-09			160.00	9-26
Do	80.00	3-26-10			80.00	4.20
Do	210.00	5-23-11			210.00	5-23
Do			2,000.00	9-27-09	2,000.00	9-27
Do			2,000.00	9-27-09	2,000.00	9-27
Do			500.00	4-27-10	500.00	4-27
Do			500.00	4-27-10		
Do			500.00	5-23-10		
Do			600.00	5-23-11	600.00	5-23
ersole, C. D.			600.00	11-23-10	600.00	11-23
Do					500.00	8-27
Do					244.44	4-27
Do					600.00	11-23
Do					500.00	8-27
Do					600.00	11-23

CLOSE IN CENTER

Do						500.00	12-27
Elliott, S. E.			640.00	11-26-09		640.00	11-26
Edwards, W. M.			520.00			520.00	11-1
Frazier Lbr. Co.	174.25	Demand				174.25	7-21
Do	181.83	"				181.83	7-21
Do	199.00	"				199.00	6-21
Do	194.84	"				194.84	7-21
Do	129.68	"				129.68	6-21
Do	136.35	"				136.35	6-21
Farmers & M. Merc. Co.			1,000.00	7-12-09			
Floyd & Dean	2,000.00	8-19-09					
Floyd, S. H.	1,000.00	10-18-09				1,000.00	
Gallilean Fishermen ..	21,840.00	8-5-09				21,840.00	8-5
Gaudin, Jas. T.	200.00	10-6-09				150.00	10-6
Garrett, W. C.	125.00	7-26-09				125.00	7-26
Greer, J. J.	500.00	11-12-09				500.00	11-12
Do	250.00						
Green, J. C.	108.00	11-15-09				108.00	11-15
Garden, J. A.	162.00	12-1-09				162.00	12-1
Griffith, S. O.	60.00					60.00	2-28
Do	60.00					60.00	8-30
Do	48.00					48.00	2-28
Do	48.00					48.00	8-30
Do	36.00					36.00	8-30
Do			900.00	8-9-11		600.00	8-30
Goldwaithe, Willis ...			300.00				
Gordon, O. A.			150.00	9-17-09		150.00	9-17
Gaither, J. W.			482.29	11-1-09		482.29	12-1
Head, J. S. & B. T. ...						2,060.00	7-4
Do	2,575.00	6-22-09				2,575.00	6-22
Head, J. S. & B. T. ...	1,000.00	1-4-10				1,000.00	1-4
Hopkins, F. H.	100.00	8-1-09				100.00	10-30
Hurst, A. A.	115.00	10-1-09				115.00	10-1
Do	500.00					500.00	12-23
Hester, John J.	400.00	12-1-09				400.00	12-1
Horton, G. R.	125.00	11-31-09					
Do	125.00	11-30-09				125.00	11-30
Hawkins, F. F.	100.00	11-15-09				100.00	11-16
Harris, E. M.	214.00	11-1-10				214.00	1-1

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ntsville Knitting Co.			1,300.00	8-16-09			
ath, M. L.			427.00	11-2-09	427.00	11-5	
ll, W. C.					250.00	8-19	
ll, S.					800.00	7-25	
terstate Securities Co.					8,000.00	1-23	
ffee, J.	100.00	8-27-09					
rdan, G. M.	108.00	12-29-09			108.00	12-29	
Do			183.00	10-1-09	183.00	10-1	
hnson, Fred			254.66	10-15-09	254.66	11-15	
nes, Harry			250.00	7-2-09			
dd, J. M.	1,000.00	5-25-10			1,000.00	5-25	
Do			1,048.84	10-20-09	1,048.84	10-20	
Do			500.00	11-15-09	500.00	11-15	
Do			1,000.00	12-1-09	1,000.00	12-1	
raus & Noges					500.00	7-16	
wrence, J. P.	150.00	7-26-09			150.00	7-26	
shy, Gordon	209.42	12-9-09			209.00	12-9	
ne, A. O.	150.00	12-2-09			150.00	12-2	
Do			900.00		450.00		
martin, C.					800.00	9-11	
wis, J. R.			350.00	9-20-09	350.00	9-19	
ghter, B. C.			5.000.00	10-10-09	5,000.00	11-11	
yton, T. H.			150.00				
oorman, J. M.	942.00	12-7-09			942.00	12-7	
Mahan, F. L.	125.00	8-19-09			125.00	8-19	
Connell, J. A.			616.00	7-11-09			
yers, Wm.			200.00	10-5-09	200.00	11-5	
rris, S. A.			200.00	11-15-09	200.00	11-15	
rtin, T. J. et al			265.00	12-2-09	265.00	12-2	
Leod Lumber Co. ..					155.00	6-17	
Do					165.00	6-19	
Do					145.00	6-19	
chols, W. E.	150.00	7-21-09			150.00	7-19	
chols, F. B. et al			105.00		105.00	11-4	
kman Fur. Co.	300.00						
Do			300.00	9-30-09			
wers, Mrs. A. E.	24.00	6-19-11			24.00	6-19	
Do	24.00	6-19-10			24.00	6-19	
Do	24.00	6-18-09			24.00	6-19	

CLOSE IN CENTER

Do	24.00	12-19-09			24.00	12-1
Do	24.00	12-19-10			24.00	12-1
Do			500.00	6-19-11		
Do					600.00	6-19
Pinckard, E. M.	500.00	12-7-09			500.00	12-7
Pearson, A. A.	189.00	11-1-09			89.00	11-1
Peevey, Hinds	2,000.00	5-29-10			2,000.00	5-10
Do			195.00	7-8-09		
Do					500.00	7-23
Perry, T. B. et al			455.00	7-29-09		
Pugh, John C. et al			3,000.00	12-31-09	3,000.00	12-3
Prince, E.					200.00	9-5
Quinn, W. E.	400.00	1-1-10			400.00	1-1
Rector, H. A.	172.80	12-8-09			172.81	12-8
Riser & Co. G. M.	1,040.00	11-29-09			1,040.00	11-2
Do			106.62	9-27-09	106.62	9-27
Do			1,000.00			
Do			1,580.00	10-12-09	1,580.00	11-1
Robinson, E. M.			400.00	7-12-09		
Robinson Lbr. Co.			175.87			
Rittenberg, R.					250.00	10-4
Stewart, E. R.					2,583.00	8-19
Do					300.00	10-2
Do			4,320.00		4,320.00	10-1
Shelby Peevey Co.	500.00	9-5-09			500.00	9-1
Do	695.00	9-15-09			695.00	9-15
Seals, Carl	100.00	11-1-09				
Do	150.00	9-13-09			150.00	9-13
Smith, E. A.	2,250.00	7-26-09			2,250.00	10-2
Smith, A. J.	270.00	12-15-09			270.00	12-1
Soper, Mrs. L. P.			4,000.00	8-10-09	4,000.00	8-1
Smith, Eula E. et al			600.00	8-10-09	600.00	8-10
Smith, A. D. et al			250.00	12-15-09	250.00	11-1
Stacey, H. T. et al			100.00	7-17-09		
Slocumb Fur. Co.					300.00	9-26
Schrader, I. C.			536.00	1-1-10	536.00	1-1
Thomas, J. P.					175.00	9-8
Tyler & Co.	1,479.50	6-24-09			1,479.50	11-2
Thompson, W.	324.00	12-15-09			324.00	12-1

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ent Merc. Co.			2,080.00	10-6-09	2,000.00	11-6
Do					2,000.00	11-21
llis, Chas. T.	250.00	5-24-10			250.00	5-24
elock, W. K.	250.00	10-9-09			250.00	10-9
od, Mrs. R.	1,000.00					
Do	500.00	11-24-09			500.00	11-24
Do			527.78	12-1-09	527.78	12-1
Do			500.00	11-1-09		
tson, J. T.			300.00	9-17-09		
tson, I. J.					500.00	9-17
ight Bros.			2,000.00	7-13-09		
lker, M. P. et al			285.00			
ight, C. W.					125.00	12-2
Do					125.00	6
ite, J. J.					200.00	9-30
Do					200.00	9-30
					$152,297.38	

Table 2.—The following is a list of the paper shown in the third column above and not contained in either of the other two columns, and is here tabulated for easy reference:

American Adv. Sales Co.	$ 500.00	11-1
Do	1,000.00	11-1
Alford, B. A.	1,000.00	10-15
Ala. & Ky. Coal Co.	300.00	7-16
Bennett, J. E.	300.00	7-22
Butler, C. H.	350.00	11-21
Butler, C. H.	500.00	12-12
Barber, W. W.	500.00	6-25
Chenoweth, W. A. Jr.	100.00	10-1
Cosper & Co., W. D.	1,000.00	11-25
Coxe, C. P.	5,000.00	
Dearborn, A. R.	1,000.00	11-1
Dearborn, A. R.	250.00	
Doan, Cora P.	2,000.00	2-25
Ebersole, C. D.	500.00	8-27
Do	244.44	4-27
Do	600.00	11-23

LOSE IN CENTER

Do	500.00	8-27
Do	600.00	11-23
Do	500.00	12-7
Head, J. S. & B. T.	2,060.00	7-4
Hill, W. C.	250.00	8-19
Hall, S.	800.00	7-25
Interstate Securities Co.	8,000.00	1-23
Kraus & Noges	500.00	7-16
McLeod Lumber Co.	155.00	6-17
Do	165.00	6-19
Do	145.00	6-19
Powers, Mrs. A. E.	600.00	6-19
Peevey, H.	500.00	7-23
Prince, E.	200.00	9-5
Rittenberg, R.	250.00	10-4
Stewart, E. R.	2,583.00	8-19
Stewart, E. R.	300.00	10-13
Slocumb Fur. Co.	300.00	9-26
Thomas, J. P.	175.00	9-8
Vincent Merc. Co.	2,000.00	11-21
Watson, I. J.	500.00	9-17
Wright, C. W.	125.00	12-2
Wright, C. W.	125.00	6
White, J. J.	200.00	9-30
White, J. J.	200.00	9-30
	$36,877.44	

Table 3.—The following shows payments upon $28,000.00 paper of Alabama Trust & Savings Company to defendant from outside sources:

August 30, 1909	P. N. Chenoweth	$100.00
January 8, 1910	U. J. W. Peters	250.00
January 8, 1910	B. H. Cooper	110.00
January 12, 1910	Home Fur. Company	50.00
January 12, 1910	Union Produce Company	100.00
	Total,	$610.00

Table 4.—The following shows payments upon $28,000.00 paper of Citizens Bank assumed by Alabama Trust & Savings Company to defendant from outside sources:

March	31, 1909	E. G. Cole	$ 2,046.67
July	4, 1909	E. G. Cole	2,000.00
September	1, 1909	Schulz note	250.00
September	16, 1909	note—no name given	200.00
October	1, 1909	note—no name given	1,000.00
December	5, 1909	20 shares Bank of Cortland stock	1,500.00
December	15, 1909	C. D. Ebersole	600.00
December	23, 1909	North B'ham stock	12,506.50
January	12, 1910	C. D. Ebersole	500.00
January	20, 1910	L. B. Riker	75.00
January	22, 1910	C. D. Ebersole	600.00
January	30, 1910	E. P. Coxe	4,946.33
		Total	$26,225.00

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Section 3560 Ala. Code 1907, Provides a Specific and Exclusive Method for the Liquidation of Insolvent Banks and the Appointment of Receivers Thereof. 6

Petitioner was not Appointed Receiver in a Proceeding Instituted by the Attorney-General under Sec. 3560 and therefore has no Title to Assets by Virtue of the Statute. 7

The Assets sought to be Recovered by Petitioner were Duly Administered in a Proceeding Instituted by the Attorney-General under Sec. 3560.. 8

The Decree of Settlement in that Proceeding of all Claims Asserted by Petitioner in this Suit. 10

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SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1918.

No. 378.

W. C. Sterrett, as Receiver of The Alabama Trust & Savings Company, Petitioner,

vs.

Second National Bank of Cincinnati, Ohio.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR RESPONDENT.

Statement of the Case.

The case was heard in the District Court on the amended bill filed June 10, 1914 (R. 17), the answer thereto (R. 41), and evidence. The opinion on final hearing is at pages 88 to 97 of the record, an addenda of the opinion at p. 98, and the decree entered May 1, 1916, at p. 100. The court found (R. 92) that "the defendant was not guilty of any fraud in connection with the formation of the Trust Company (City Bank & Trust Company, whose corporate name was later changed to Guarantee Bank & Trust Company), or the

merger into it of the Alabama Bank (Alabama Trust & Savings Company)," which took place September 27, 1909; that "the State Banking Department examined the bank (City Bank & Trust Company) and took no exception to its method of organization, and subsequently after the bank's failure and when knowledge of its transactions had become known, elected to maintain suits on its behalf" (R. 92); that "the plaintiff's claim for a recovery on account of the collateral pledged is not sustained by the evidence, and that he cannot recover on account of any collateral pledged to the defendant by the Alabama Bank (Alabama Trust & Savings Company) the Trust Company (City Bank & Trust Company) or the Guaranty Company (same company), or on any other account, unless it shall be found that he is entitled to recover the whole or a part of the $17,200 credited on the Brannon & Smith notes, and any other small sum or sums representing the proceeds arising from the collection of paper pledged to the defendant bank, which were credited on some one or more of the notes originally aggregating $84,200" (R. 95). The aggregate sum was found (R. 98) to be $18,055.33 and that although "authority so to pay was given the defendant and was acted upon by it," which was on June 11, 1909, the payment was illegal and a decree was entered against defendant for $18,055.33 with interest from May 1, 1909 (R. 100).

The Decision of the Court of Appeals.

The opinion of the Court of Appeals is found commencing at p. 231 of the record, and is reported in 246 Fed. 753. The following syllabus of that report correctly states the grounds of the decision:

> 1. "A mere 'chancery receiver' is but an officer of the court appointing him, and, in the absence of some conveyance or statute vesting in him title to the debtor's property, he cannot sue in the courts of a foreign jurisdiction for its recovery upon the mere order of the appointing court or by virtue alone of his appointment as receiver; and, in the absence of actual conveyance, the question whether the receiver has title is governed by the statutes of the state by whose court the appointment was made."
>
> 2. "Under Code Ala. 1907, Secs. 3509, 3511, 3512 and 3560, as construed by the Supreme Court of the state, a receiver appointed in involuntary proceedings against an insolvent corporation is not vested with title to the property of the corporation, but is 'the mere agent of the court for the collection and distribution of the assets,' and such a receiver cannot be authorized by the court to maintain an action to recover assets in a foreign jurisdiction."

The rules of law stated in the first syllabus are settled by repeated decisions of this court, beginning with Booth vs. Clark, 17 How. 322 (1854), which was approved in Hale vs. Allinson, 188 U. S. 56 (1903), Mr. Justice Peckham speaking for the court saying (p. 68): "We do not think anything has been said or

decided in this court which destroys or limits the controlling authority of that case," and in Great Western Mining Co. vs. Harris 198 U. S. 561 (1905) where Mr. Justice Day, speaking for the court, quoted the foregoing statement of Mr. Justice Peckham, and said (p. 574): "While that case (Booth vs. Clark) was decided in 1854, its authority has been frequently recognized in this court."

The following syllabus fairly states the grounds of the decision in Great Western Mining Co. vs. Harris, 198 U. S. 561 (1905):

> "A receiver is an officer of the court which appoints him, and in the absence of some conveyance or statute vesting the property of the debtor in him, he cannot sue in courts of a foreign jurisdiction upon the order of the court appointing him, to recover the property of the debtor. Booth vs. Clark, 17 How. 338.
>
> A receiver's right to sue in a foreign jurisdiction is not recognized upon principles of comity, as every jurisdiction in which it is sought by means of a receiver to subject property to the control of the court, has the right and power to determine for itself who the receiver shall be, and to control the distribution of the funds realized within its own jurisdiction.
>
> Where the receiver can not maintain an action to recover property in a jurisdiction other than that in which he was appointed, jurisdiction is not established because the action is authorized to be instituted by the receiver in the name of the corporation, if it appears that in

case of a recovery the property would be turned over to the receiver to be by him administered under the order of the court appointing him."

In Keatley vs. Furey, 226 U. S. 399 (December, 1912), which involved the standing in a circuit court of the United States in Illinois, of a receiver appointed in West Virginia, Mr. Justice Holmes said, at p. 403:

> "But of course the petitioner's standing in the lower court depended on his having title, and was not a consequence of his West Virginia appointment alone unless at least he got a title by virtue of it, as it was provided by statute in express terms that the receiver should, in Relfe vs. Rundle, 103 U. S. 222. See Great Western Mining Co. vs. Harris, 198 U. S. 561, 574. The effect of such a provision need not be considered in this case. In some instances, at least, it would be enforced outside of the State. Bernheimer vs. Converse. 206 U. S. 516, 534. Converse vs. Minnesota Thresher Manufacturing Co., 212 U. S. 567. Converse vs. Hamilton, 224 U. S. 243, 257. See Chipman vs. Manufacturers' National Bank, 156 Massachusetts, 147, 148, 149. Haskell vs. Merrill, 179 Massachusetts, 120, 124. The statute of West Virginia on the other hand provides for the appointment of receivers to 'take charge of and administer' the assets, and for the bringing of suit and the conveyance of property in the corporate name thereafter. Code, ch. 53, sections 58, 59. It seems, to be sure, that in September and October the local West Virginia court purported to authorize and confirm a deed by a special commissioner to the receiver, but if

> the statute did not itself constitute the receiver the universal successor of the corporation, see Chipman vs. Manufacturers' Nat. Bank, 156 Massachusetts, 147, 148, 149, it may be doubted whether the deed had extraterritorial effect. See Fall vs. Eastin, 215 U. S. 1. The argument is strong to support the judgment of the court below that no title passed."

After the decision in Hale vs. Allinson, 188 U. S. 56 (1903), the Minnesota Statute was amended, and it was under the amendment that jurisdiction was sustained in the Converse Cases, not on the ground of comity, but to give full faith and credit to "the laws of Minnesota, and the judicial proceedings in that State, upon which the receiver's title, authority and right to relief were grounded, and by which the stockholders were bound." 224 U. S. 261.

I.

Section 3560 of the Alabama Code provides a specific and exclusive method for the liquidation of insolvent banks and the appointment of receivers thereof.

Chapter 69 of the code, which occupies 84 pages of the second volumn, commencing at p. 397 is entitled "Corporations." It contains 22 separate "articles" each dealing with a special subject and all, expect article 7, containing many "sections." Article 11 is entitled "Examination and regulation of banks" and contains 24 separate "sections," embodying provisions for stated and special reports to the state treasurer, the

appointment of a state bank examiner by the governor and his duties, reserve funds, impairment of capital, penalties, etc. The last two sections are as follows:

> **3560. Proceedings when bank found not solvent.** Whenever the treasurer finds that a bank or corporation chartered by the laws of this state and doing a banking business, is not in a solvent condition, he shall immediately report the condition of the bank to the governor, and the governor shall direct the attorney-general to institute proceedings in a court having jurisdiction in the county where the bank or parent bank is located, to put the bank in the hands of some competent person, who shall give bond in an amount to be fixed by the judge for the faithful discharge of his duties, and said person so appointed shall immediately take charge of the business of said bank, collecting its assets and paying off its liabilities under the law and rules of such court.
>
> **3561. Scope of this article.** The provisions of this article shall apply to all banks, except national banks, and to all trust companies and individuals doing a banking business, whether incorporated or not.

The petitioner was not appointed receiver in a proceeding instituted by the attorney-general by direction of the governor as provided in section 3560, but in a chancery suit commenced by two private creditors (exhibit 7, R. 38), and it is therefore immaterial whether a receiver appointed under section 3560 is "the universal successor" of the bank or has title to its

assets by virtue of the statute. What the court said in Oates vs. Smith, 176 Ala. 39, with respect to a receivership under section 3560 was that "the trust fund theory of the statute as well as the equitable rights of the receiver just as effectually hold and protect the assets of the bank for the purposes in view **as if the legal title were vested in the receiver.**" The "purposes in view" in that case involved only the claim of a debtor to set off a debt of the bank acquired after insolvency.

II.

The Assets Sought to be Recovered by Petitioner were Duly Administered in a Proceeding Instituted by the Attorney-General Under Section 3560.

The name of the City Bank and Trust Company, to which all of the assets of the Alabama Trust and Savings Company were transferred September 27, 1909, and which assumed all of its obligations, was afterwards changed to the Guarantee Bank & Trust Company, which was its corporate name when the attorney-general instituted a proceeding under section 3560 which is set forth with some detail in the opinion of the court in Oates vs. Smith, 176 Ala. 39. After quoting section 3560, Somerville, J., said:

> "Proceeding in accordance with this statute, the attorney-general filed his bill in the Jefferson chancery court against the Guarantee Bank & Trust Company, alleging that the state treasurer had certified to the governor that the

> respondent bank was not in a solvent condition, and praying for the appointment of some competent person as receiver to immediately take charge of the business and property of said bank, to collect its assets, and hold them subject to the orders of the court. The court thereupon appointed the appellee, E. D. Smith, as such receiver, who took charge of the bank, and proceeded to collect its assets. The receiver soon afterwards filed his report showing that the bank was hopelessly insolvent, and on November 8, 1910, the court ordered that all creditors should file their claims against the bank on or before January 10, 1911; and on December 17, 1910, further ordered that the receiver should allow set-offs only in those cases where debtors held or owned certificates of deposit of said bank, general or interest-bearing, at the time of the commencement of the receivership."

After stating the claim made by Oates in his petition filed in the lower court and its decision thereon, and saying that "the controlling question raised by the appeal was whether a claim acquired by the debtor of an insolvent banking corporation in the hands of a receiver, after the appointment of the receiver, is available as a set-off against his debt previously existing," Somerville, J., said:

> "The effect of section 3560 of the Code is to create a statutory receivership, subject, of course, to the general principles which govern that branch of equity law, and subject specifically to section 3509 of the Code, which provides

> that 'the assets of insolvent corporations constitute a trust fund for the payment of the creditors of such corporations, which may be marshaled and administered in courts of equity in this state.' These two statutes are, of course, parts of a single system, and co-operate in the clearly defined purpose of the legislature to promptly sequester the assets of insolvent state banks, to the end that such assets may be impartially administered in favor of all the creditors. Upon the filing of a bill of complaint, appropriate in form and substance, a court of equity is authorized to appoint a receiver for the purposes stated, and the decree of appointment operates ipso facto as a potential adjudication of insolvency, fixing the status of corporate assets, and qualifying the rights of corporate creditors."

It was in the foregoing proceeding that the Second National Bank of Cincinnati filed its claim for $57,379.59 as a creditor of the Guarantee Bank & Trust Company on account of loans to it and to the Alabama Trust & Savings Company which the Guarantee Bank had assumed (R. 59). E. D. Smith, receiver, contested the claim on all the grounds set up in the amended bill in this case and in substantially the same language (R. 61). The receiver petitioned the court for leave to compromise (R. 75) which was granted by a decree entered October 28, 1911 (R. 81), and defendant ~~only~~ duly carried out all of the terms of the settlement.

At the foot of the decree is the following clause:

"This decree shall be without prejudice to any rights of W. C. Sterrett as Receiver of the Alabama Trust & Savings Company, or of Tuskegee Land & Security Company." This reservation, which according to the present claim of the petitioner, nullifies the entire decree, was evidently intended to reserve the rights in two suits then pending, in one of which the Tuskegee Land & Security Company was complainant and the Alabama Trust & Savings Company, Guarantee Bank & Trust Company, E. D. Smith as Receiver of the Guarantee Bank & Trust Company and the Second National Bank of Cincinnati were defendants. In the other suit Sterrett as Receiver of the Alabama Trust & Savings Company was complainant, and the Second National Bank of Cincinnati, Guarantee Bank & Trust Company and E. D. Smith as Receiver thereof were defendants. These suits were subsequently in June, 1912, settled as appears by Exhibit A (R. 209). They involved a transaction whereby Tuskegee Land & Security Company sold to the Grand Order of Galileean Fishermen a tract of land, for which the purchaser gave its note for $21,000.00 secured by a mortgage on the property. The Tuskegee Land & Security Company sold this note to the Alabama Trust & Savings Company for $16,000 cash and a certificate of deposit for $5,000. The mortgage was foreclosed and the property sold, title being taken in the name of E. D. Smith, Receiver of the Guarantee Bank & Trust Company. The two suits, No. 6281

brought by Sterrett as Receiver of the Alabama Trust & Savings Company, and No. 5866 brought by the Tuskegee Land & Security Company, contested the title that had been acquired by E. D. Smith, Receiver, in connection with the foreclosure of the mortgage. Conflict of claims was thereby precipitated with respect to these lands and it was to save the rights of Sterrett, Receiver, and also the rights of Tuskegee Land & Security Company, whatever those rights might turn out to be with respect to these two suits, that at the end of the decree approving the settlement, there was added the "without prejudice" clause. By virtue of this "without prejudice" clause Sterrett as Receiver and Tuskegee Land & Security Company in June, 1912 (R. 210) came to an agreement, according to which their suits were dismissed, but with a specific reservation to Sterrett of a right to prosecute the present suit, which in the meantime had been brought (May 11, 1912) unaffected by anything contained in the entry; a reservation that could not add anything to the right of Sterrett to bring the present suit, which had already been brought, or to prosecute it, and which would not have been necessary or appropriate if the "without prejudice" clause in the settlement decree of October 28, 1911 (R. 83), was supposed to have the sweeping scope and effect now claimed by petitioner.

III.

The reasons for refusing to recognize the powers of receivers in a foreign jurisdiction are important in this suit.

In Great Western Mining Co. vs. Harris, 198 U. S. 561, Mr. Justice Day after quoting from the opinion of Mr. Justice Wayne in Booth vs. Clark to show some of the "reasons for refusing to recognize the powers of a receiver in foreign jurisdictions" said (p. 576):

> "It will thus be seen that the decision in Booth vs. Clark, rests upon the principle that the receiver's right to sue in a foreign jurisdiction is not recognized upon principles of comity, and the court of his appointment can clothe him with no power to exercise his official duties beyond its jurisdiction. The ground of this conclusion is that every jurisdiction, in which it is sought by means of a receiver to subject property to the control of the court, has the right and power to determine for itself who the receiver shall be, **and to make such distribution of the funds realized within its own jurisdiction as will protect the rights of local parties interested therein,** and not permit a foreign court to prejudice the rights of local creditors by removing assets from the local jurisdiction without an order of the court or its approval as to the officer who shall act in the holding and distribution of the property recovered."

Counsel for petitioner, at page 35 of their supplemental brief, under the title "measure of recovery," say:

> "After the costs and expenses of administration, and creditors, are paid, the surplus goes to the corporation, if in existence; and, if dissolved, pro rata to the stockholders **who choose to intervene. With this distribution and the amount required to completely effect it, the court in which the plenary suit is pending has no concern.**"

At page 42 they say:

> "Moreover, the instant the court of plenary suit invades the province of the court of administration and assumes to anticipate its needs, it must, of necessity, take stock of its wants, costs, allowances and expenses, and what should be paid each creditor and stockholder—in short, **usurp and take control of the estate and of its administration.**"

In his petition for writ of certiorari (p. 5) petitioner says that "the sum involved is large amounting approximately to $200,000.00." What he proposes to do with this large sum is shown by the order entered in the Jefferson Chancery Court on January 29, 1914 (R. 174), which provides in general terms and in unlimited amounts for expenses, allowances, fees of the receiver's attorneys, and directs distribution of the balance among seven creditors whose claims amount to $2,413.57 with interest, and to nineteen whose claims amount to $13,032.22, including the claim of Tuskegee Land &

Security Company for $5,000.00, but not including any claim of the defendant. After said creditors are paid with interest "the balance shall be divided, distributed and paid to 34 named stockholders according to their respective shares which is stated, totaling 65, or to Edmund H. Dryer, their attorney of record for such stockholders." This suggests a fat distribution among a few favorite stockholders of a bank whose capital was $100,000 and which the amended bill alleges to have been insolvent in September, 1909.

The suit in the Jefferson Chancery Court in which petitioner was appointed receiver was filed July 21, 1910 (R. 39). It prayed for a receiver pendente like, but no steps were taken until April 27, 1911, when petitioner was appointed receiver (R. 30). He took no steps, as he now insists, in the attorney-general's suit to protect assets now claimed by him. Apparently he was lying low for the present suit which appears to be attorney-made. The receiver Sterrett testified (R. 160): "Of my own knowledge I do not know of any fraudulent acts in the organization of the City Bank & Trust Company. The facts set forth in my amended bill were worked up by my attorney." See also his testimony on cross-examination (R. 213, 214), where he says with respect to an allegation in the ~~Charles M. Leslie of counsel~~, amended bill (R. 21), that defendant had fraudulently appropriated $40,000 of securities: "I did not see anything in the records upon which to base the allegation because I did not search for it."

Conclusion.

We respectfully submit that the judgment of the Court of Appeals in reversing the decree of the District Court should be affirmed and modified so that the record will be remanded to the District Court with directions to dismiss the suit, since it appears that petitioner has no title to the assets of the Alabama Trust & Savings Company. The amended bill (R. 18) states that "he brings this bill of complaint pursuant to and in accordance with the provisions of section 3509 of the Code of Alabama of 1907 and the orders and decrees to him directed by the Chancery Court of Jefferson County, Alabama, copies of which are attached hereto and made part hereof and the authority in him so vested." Section 3509 vests him with no title, so that according to his own allegations he depends only upon the authority conferred upon him by the orders and decrees of the Chancery Court of Jefferson County.

In State Bank & Trust Company vs. Leonard, Receiver of the Grand Order of Galileean Fishermen, 168 Ala. 404, the court said that section 3509 of the Code of 1907 "was only intended to settle what had theretofore been a disputed question as to the common law of this State upon that subject."

Respectfully submitted,

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Charles M. Leslie,

Of Counsel.